

Designed to Break You

HUMAN RIGHTS VIOLATIONS
ON TEXAS' DEATH ROW



HUMAN RIGHTS CLINIC
THE UNIVERSITY *of* TEXAS SCHOOL *of* LAW

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A REPORT FROM THE HUMAN RIGHTS CLINIC AT THE UNIVERSITY OF TEXAS SCHOOL OF LAW

This report does not represent the official position of
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ACRONYMS & ABBREVIATIONS

ECHR:	European Convention on Human Rights
ECtHR:	European Court of Human Rights
IACHR:	Inter-American Commission on Human Rights
ICCPR:	International Covenant on Civil and Political Rights
OAS:	Organization of American States
OHCHR:	Office of the High Commission on Human Rights
TDCJ:	Texas Department of Criminal Justice

EXECUTIVE SUMMARY

THE STATE OF TEXAS STANDS TODAY AS ONE OF THE MOST EXTENSIVE UTILIZERS OF the death penalty worldwide. Consequently, inmate living conditions on Texas' death row are ripe for review. This report demonstrates that the mandatory conditions implemented for death row inmates by the Texas Department of Criminal Justice (TDCJ) are harsh and inhumane. Particular conditions of relevance include mandatory solitary confinement, a total ban on contact visits with both attorneys and friends and family, substandard physical and psychological health care, and a lack of access to sufficient religious services. Investigation into these conditions reveals that current TDCJ policy violates international human rights norms and standards for confinement. Conditions on death row at TDCJ's Polunsky Unit must be remedied posthaste.

In 1999, Texas reintroduced the practice of mandatory solitary confinement for every individual convicted of capital murder. Solitary confinement involves total segregation of individuals who are confined to their cells for twenty-two to twenty-four hours per day, with a complete prohibition on recreating or eating with other inmates. An average cell is no bigger than 8 feet by 12 feet, and contains only a sink, a toilet, and a thirty-inch-wide steel bunk with a thin plastic mattress. Inmates are rarely provided with adequate blankets and often suffer from ongoing physical pain due to the mattress provided. The majority of cells include a small window, but inmates are only able to see out by rolling up their mattress and standing on it. This fact paired with the lack of adequate outdoor recreation time means that daily exposure to natural light is rare. Every individual on Texas' death row thus spends approximately 23 hours a day in complete isolation for the entire duration of their sentence, which, on average, lasts more than a decade. This prolonged solitary confinement has overwhelmingly negative effects on inmates' mental health, exacerbating existing mental health conditions and causing many prisoners to develop mental illness for the first time. In addition to the detrimental effects of isolation, the practice of setting multiple execution dates means that many prisoners are subjected to the psychological stress of preparing to die several times during their sentence.

Inmates on death row experience severe barriers to accessing medical care, in part due to being housed in solitary confinement and being less able to effectively self-advocate. Inmates are not offered regular physical or psychological check-ups, and must rely on the guards to communicate and facilitate any healthcare appointments. Such requests for care are, at best, responded to within a few days, but can go several weeks without a response and are often ignored or forgotten about. In terms of psychological healthcare – an issue of great importance given that a large majority of inmates on death row suffer from some form of psychological illness – only inmates who were already taking psychiatric medication are able to meet regularly with psychiatrists. Of those inmates who are eventually given access to psychological care, they are generally only prescribed some form of psychiatric medication, thus exacerbating the unmet need for some form of counseling or non-pharmaceutical therapy. Inmates with mental illness who do not necessarily

want or need prescription drugs are essentially provided with only two options: take unwanted medication, or forgo psychological healthcare entirely.

Another major issue of concern is the lack of access to religious services on death row. The extent to which inmates are able to access religious text is limited, as Christian bibles are the only material available from the prison chaplain. Although Christian inmates can request such materials, they are rarely given access to ministers until the holiday season. For inmates of different faiths, such as Islam or Judaism, the situation is more difficult as they must solely rely on outside sources for their religious materials. They are provided with no access to practice their chosen faith, and are often met with contempt when seeking such access. This has created a harsh environment for inmates who do not adhere to Christianity, and has enabled a discriminatory system on the basis of religion on Texas' death row.

This report, prepared by the Human Rights Clinic at the University of Texas School of Law, concludes that current conditions in TDCJ facilities constitute a violation of Texas's duty to guarantee the rights to health, life, physical integrity, and dignity of detainees, as well as its duty to prevent cruel, inhuman or degrading treatment of its inmates. These duties are recognized by human rights instruments such as the Universal Declaration of Human Rights, and the American Declaration on the Rights and Duties of Man. The Inter-American Commission on Human Rights and other human rights bodies have repeatedly issued opinions decrying the inhumane conditions present at the Polunsky Unit. Particularly, international human rights bodies had considered that the prolonged and mandatory use of solitary confinement is "disproportionate, illegitimate, and unnecessary".

RECOMMENDATIONS

The right to be free from torture is an absolute human right, and it is submitted that the current conditions of confinement on Texas' death row, including mandatory indefinite isolation, amounts to a severe and relentless act of torture. The Clinic recommends that TDCJ and the Texas Legislature heed the numerous advisements of international bodies, and adopt the appropriate measures to remedy the faults found in this report. This should be done with the implementation of the following:

Solitary Confinement

1. Texas should impose strict limits on the use of solitary confinement and bring the conditions of death row detention facilities into line with international standards.
2. Solitary confinement should only be imposed as a measure of last resort, and for as short a time as possible.
3. This includes abolishing the mandatory use of solitary confinement for death row inmates and reinstating living conditions more similar to an average TDCJ unit.
4. Because of its adverse psychological effects, Texas should entirely ban the use of solitary confinement for inmates with mental illness or intellectual disability.
5. Reinstate contact visits for death row inmates, both with family and friends and with attorneys.
6. Ensure inmates have access to natural light, fresh air and outdoor activities.

Repeated Calls up to Execution

1. Review the current Texas statute to ensure that any and all possible legal remedies are completely exhausted before an execution date can be set by TDCJ.
2. Access to Health Care:
3. Make it easier for inmates to request medical care by improving communication channels between inmates and health care providers.
4. Ensure that routine check-ups, both physical and psychological, are conducted at appropriately frequent intervals.
5. Provide counseling and mental health care for inmates both prior to execution and after a last-minute stay has been granted.

Access to Religious Services

1. Reinstate communal religious services for inmates at Polunsky Unit.
2. Provide easy access for religious volunteers, including ensuring that sufficient guard escorts are available for visitors.

INTRODUCTION

AS OF DECEMBER 2016, 242 MEN AND WOMEN ARE CONFINED ON TEXAS' DEATH row.¹ On average, each of these inmates has spent 14 years and 6 months housed there.² Since 1999, 236 of these 242 inmates³ have resided on the death row for men in the Texas Department of Criminal Justice's (TDCJ) Polunsky Unit in Livingston, Texas. Robert Perkinson, the author of *TexasTough*, described the Polunsky Unit as "[t]he most lethal [death row] anywhere in the democratic world."⁴ In 2016, for the first time in over a decade, only one state in the U.S. executed more individuals than Texas, with 7 executions taking place in Texas, and 9 in Georgia.⁵

This Report aims to be the first in a series of reports issued by the University of Texas at Austin School of Law Human Rights Clinic, which will tackle a succession of international human rights concerns presented by Texas' implementation of the death penalty. This Report will focus on current conditions on Texas' death row, and how this affects the day-to-day lives of inmates awaiting execution. Here, the Clinic will discuss the mandatory use of solitary confinement for all condemned inmates, the common issuance of multiple execution dates (a practice which forces inmates to prepare for their deaths on more than one occasion), access to medical treatment (including mental health care), and access to religious services while on death row. For each of these issues, the current state of Texas' practices will be discussed and compared to the relevant international human rights standards. The Report demonstrates that TDCJ's conditions fall woefully behind international standards for confinement.

Name: Raymond G. Riles D.R.# 541
 DOB: 6 / 1 / 50 Received: 2 / 4 / 76 Age: 25 (when rec'd)
 County: Harris Date of Offense: 12 / 11 / 74
 Age at time of offense: 24 Race: black Height: 5-9
 Weight: 158 Eyes: maroon Hair: black
 Native County: Harris State: Texas
 Prior Occupation: truck driver Education level: 7 years (GED)
 Prior prison record:
 TDC #219674, rec. 11-2-79 from Harris Co. with 5-year sentence for robbery discharged 1-8-74.
 *On 5-21-85, Riles attempted suicide by setting his death row cell afire.
 *Three previous execution dates: 6-18-80, 3-17-82, 9-17-86.
 Summary: Convicted in the December 1974 attempted robbery and slaying of Houston used car dealer John Thomas Henry. Henry, 31, was shot at Honey's Car Lot, 8506 Irvington, following a dispute with Riles and co-defendant Herbert Washington over the condition of a car recently purchased by Riles. Following the shooting, Riles reportedly stood over Henry and demanded his money.
 Co-Defendants: Herbert Washington, B/M, DOB: 11-16-49. Convicted of capital murder (rec. 6-21-76) and sentenced to death. In February 1978, Washington's death sentence was commuted to 50 years. He was paroled from prison on Dec. 29, 1983.
 Race of Victim(s): white male

Raymond Riles, age 66, is currently the longest-serving inmate on Texas' death row. As of December 2016, Riles has been incarcerated on death row for 40 years and 9 months.⁶ (TDCJ)

1 Jolie McCullough & Ben Hasson, *Faces of Death Row*, THE TEXAS TRIBUNE (Jan. 10, 2017), <https://apps.texastribune.org/death-row/>.

2 *Id.*

3 *Id.*

4 James Ridgeway & Jean Casella, *America's 10 Worst Prisons: Polunsky*, MOTHER JONES (May 2, 2013), <http://www.motherjones.com/politics/2013/05/10-worst-prisons-america-allan-polunsky-unit-texas-death-row>.

5 Casey Tolan, *Texas Is No Longer America's Death Penalty Capital*, VICE (Dec. 19, 2016), https://www.vice.com/en_uk/article/texas-is-no-longer-americas-death-penalty-capital.

6 McCullough & Hasson, *supra* note 1.

METHODOLOGY

THIS REPORT IS A DESCRIPTIVE EXPLORATORY CASE STUDY OF DEATH ROW INMATES in the Polunsky Unit. In preparing this report, the Human Rights Clinic developed qualitative research methods including questionnaires addressed to inmates and unstructured interviews with relevant actors, as well as gathering available data from primary and secondary sources.

Despite a formal request to conduct a visit to the Polunsky Unit, the Texas Department of Criminal Justice failed to respond. Additional efforts to personally interview death row inmates also failed. As a result, the Clinic sent questionnaires to all former death row inmates whose sentences had been commuted and who are now residing in general population prison units. Questionnaires included a variety of questions, ranging from multiple choice answers to open-ended questions, whereby inmates were able to provide more personal and detailed descriptions of their experience on death row. In this instance, the sample population was selected based on inmates' experience on both death row and in general population, so as to ensure a sufficient and well-rounded comparison. Each questionnaire was reviewed by at least two researchers. Information was analyzed to determine its validity, competence and coherence, which was then combined with the relevant statistics, legal commentary and descriptions throughout the report. Careful consideration was taken regarding the request for anonymity of each respondent. The overwhelming majority of individuals waived their right to anonymity. Ultimately, only the testimony of those individuals who consented to identification was incorporated into the report. The report would have benefitted from first-hand information from the victims of the alleged abuses, namely, those individuals who had been subject to the conditions on death row. The clinic regrets that the TDCJ failed to grant access to these inmates.

Interviews were conducted with death penalty advocates, capital punishment attorneys, and exonerated individuals. Initial interviews were conducted with specialists in the field in order to gather preliminary recommendations and materials. Interviews were conducted via email, telephone and in-person. The Clinic also requested to meet with the Texas Department of Criminal Justice prior to publishing this report but was declined.⁷

The Clinic gathered preliminary information from Texas' governmental agencies, NGO (local and international) and international human rights organizations. Statistics were obtained from government websites, such as the Bureau of Justice website and Texas Department of Criminal Justice's information pages, as well as NGO websites, United Nations reports, and reports from other relevant human rights bodies. Data collected included the number of inmates on Texas death row by gender, race, and socio-economic background, as well as the average time spent on death row from conviction to execution. The Clinic also reviewed a number of reports from public and

⁷ Letter from Bryan Collier, Executive Director, Texas Department of Criminal Justice, to Ariel Dulitzky, Director, Human Rights Clinic, University of Texas School of Law (Mar. 27, 2017) (on file with the Human Rights Clinic).

private organizations related to death row conditions in Texas. This data revealed a consistent pattern of domestic and international condemnation of the conditions on Texas' death row.

To introduce a comparative human rights perspective to our analysis, international rulings and recommendations were gathered from the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the relevant UN bodies. Research was also conducted and reference made to decisions of the European Court of Human Rights, which allowed for a stronger statement on the overall international consensus. Decisions were then analyzed in conjunction with the relevant international treaty or convention. This combined information was analyzed together with the information provided by responses to the questionnaires, in order to establish a clear and consistent picture of the conditions of the capital punishment system within the state of Texas.

This Report from the Human Rights Clinic of the University of Texas School of Law was co-written by Abbey Docherty, Briana D. Perez, Karina Carpintero and Fiona Frazell, under the supervision and guidance of the Clinic's Director, Ariel Dulitzky.

TEXAS IN COMPARISON: “THE CAPITAL OF CAPITAL PUNISHMENT”⁸

IN 1972, THE U.S. SUPREME COURT HELD THAT IMPOSING DEATH SENTENCES ON INDIVIDUALS convicted of certain crimes constituted “cruel and unusual punishment” as prohibited by the Eighth Amendment, in addition to violating the Fourteenth Amendment⁹, outlawing all capital punishment systems in the United States. The suspension, however, was transitory, with the Supreme Court reinstating capital punishment in what has come to be known as the *Gregg* decision,¹⁰ holding that the death penalty was in fact constitutional under the Eighth Amendment. Since the death penalty’s reinstatement in 1976, Texas has emerged as a particularly lethal state, often displaying a disregard not only for individual constitutional rights, but of international human rights standards.¹¹ Many of the international cases where the U.S. was found in violation of human rights arise from Texas, with attorneys and advocates citing a myriad of constitutional and human rights concerns within the Texan criminal justice system.¹² While this report will focus specifically on post-sentencing death row conditions, it is important to touch upon the specific reasons why Texas has proven to be of particular concern with regards to its capital punishment system.

While use of the capital punishment nationwide is in decline,¹³ Texas accounts for one third of all U.S. executions. Of the top 15 counties imposing death sentences, 9 are in Texas.¹⁴ This has earned Texas a reputation as “the capital of capital punishment.”¹⁵

Texas’ problems range from “personality-driven capital sentencing”¹⁶ i.e. overzealous prosecutors seeking capital sentences at all costs, inadequate



Andre Thomas, who killed his wife and stepdaughter while carrying out what he believed was an order from God to “exorcise their demons.” Thomas later gouged out his own eyes after reading a passage from the bible, and was executed despite being diagnosed with paranoid schizophrenia.²³ (MOTHER JONES)

8 Richard C. Dieter, *The 2% Death Penalty: How a Minority of Counties Produce Most Death Cases at Enormous Costs to All*, DEATH PENALTY INFORMATION CENTER (2013), <http://www.deathpenaltyinfo.org/documents/TwoPercentReport.pdf>.

9 *Furman v. Georgia*, 408 U.S. 238, 240 (1972).

10 *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

11 *Moore v. Texas*, No. 15-797, slip op. (Mar. 28, 2017).

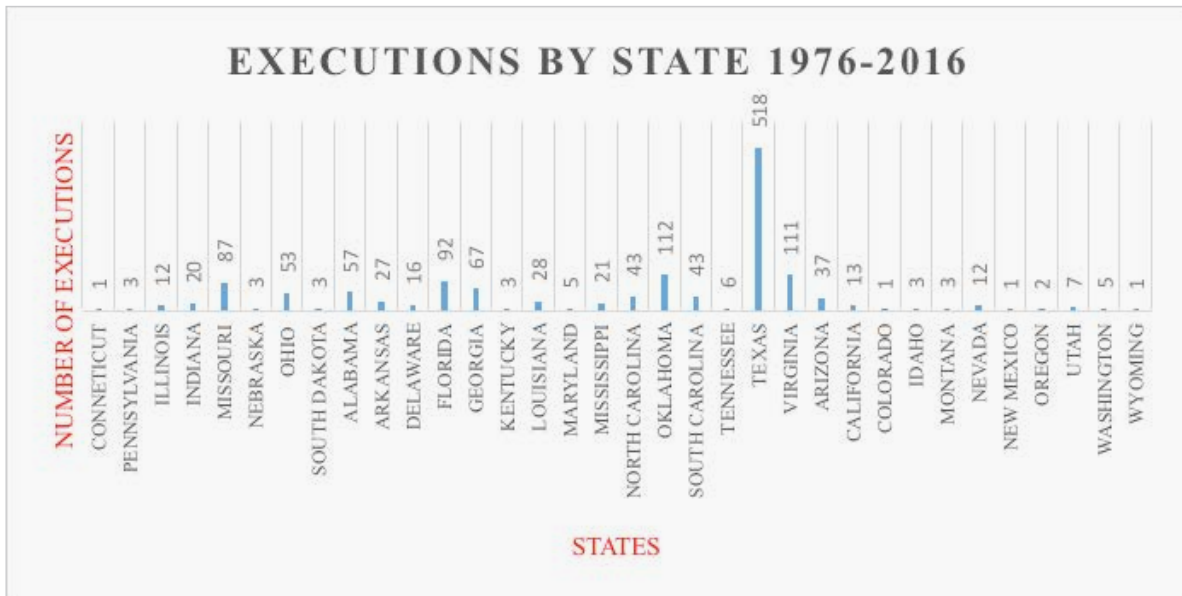
12 Texas Defender Service, *A State of Denial: Texas Justice and the Death Penalty Overview* (2001) <http://texasdefender.org/wp-content/uploads/TDS-2001-StateOfDenial-Ch1.pdf>.

13 Fair Punishment Project, *Too Broken to Fix: Part I: An In-depth Look at America’s Outlier Death Penalty Counties* (Aug. 2016) <http://fairpunishment.org/wp-content/uploads/2016/08/FPP-TooBroken.pdf>.

14 Dieter, *supra* note 8.

15 *Id.*

16 Fair Punishment Project, *America’s Top Five Deadliest Prosecutors: How Overzealous Personalities Drive the Death Penalty* (June 2016), http://fairpunishment.org/wp-content/uploads/2016/06/FPP-Top5Report_FINAL.pdf.



(SOURCE: BUREAU OF JUSTICE STATISTICS)

legal representation for defendants,¹⁷ stark racial and ethnic disparities,¹⁸ to problematic identification of defendants who have a mental illness or intellectual disability.¹⁹

Because of the problematic elements described above, many of Texas' most vulnerable inmates end up spending decades sitting on death row. Many of TDCJ's policies regarding conditions on death row—such as mandatory solitary confinement and the prohibition on inmates being permitted to work—raise fundamental human rights concerns.²⁰ These concerns are exacerbated by the number of inmates who are issued the most severe punishment available, and are subsequently housed in Texas' most restrictive correctional setting. While international standards allow States to maintain a capital punishment system, international norms impose strict requirements in terms of due process guarantees and prison conditions in the context of the death penalty²¹. Many aspects of Texas' application of the death penalty fall short of those basic international human rights standards.²² This report documents and analyzes the conditions on death row from an international human rights perspective, and discusses some of the Texas-generated human rights cases that have been brought against the U.S., prompting international condemnation of the practice in Texas.

¹⁷ Texas Defender Service, *Lethally Deficient: Direct Appeals in Texas Death Penalty Cases* (Sep. 2016), <http://texasdefender.org/wp-content/uploads/TDS-2016-LethallyDeficient-Web.pdf> [hereinafter *Lethally Deficient*].

¹⁸ *Too Broken to Fix*, *supra* note 13.

¹⁹ Texas Death Penalty Facts, *Texas Coalition to Abolish the Death Penalty*, <http://tcadp.org/get-informed/texas-death-penalty-facts/>.

²⁰ American Civil Liberties Union, *A Death Before Dying: Solitary Confinement on Death Row* (July 2013), <https://www.aclu.org/files/assets/deathbeforedying-report.pdf> [hereinafter: *A Death Before Dying*].

²¹ IACHR, *The death penalty in the Inter American human rights system: from restrictions to abolition*, OEA/Ser.L/V/II. Doc. 68 (31 December 2011), available at <https://www.oas.org/en/iachr/docs/pdf/deathpenalty.pdf>

²² See, *Id.*

²³ *How Crazy is too Crazy to be Executed?*, MOTHER JONES (Feb. 12, 2013), <http://www.motherjones.com/politics/2013/02/andre-thomas-death-penalty-mental-illness-texas>.

CONDITIONS ON DEATH ROW: SOLITARY CONFINEMENT

i. THE CURRENT SITUATION

UNTIL 1999, INMATES ON TEXAS' DEATH ROW WERE HOUSED AT THE ELLIS UNIT, where they received treatment similar to the living conditions of other inmates.²⁴ Prisoners were able to work and receive an education, eat with other inmates, and recreate together outside of their cells in the yard. In November 1998, seven inmates attempted an escape from the Ellis Unit, with one inmate successfully escaping.²⁵

TDCJ reacted immediately by moving male death row inmates to the Polunsky Unit, a more secure prison facility in Livingston, where mandatory solitary confinement was reintroduced. Solitary confinement is defined by the Istanbul Statement on the Use and Effects of Solitary Confinement as “the physical isolation of individuals who are confined to their cells for twenty-two to twenty-four hours a day,”²⁶ meaning that inmates are in complete segregation from other inmates and guards, for the entire duration of their sentence. While solitary confinement was originally imposed for the protection of the individuals themselves, it is now a mandatory and permanent feature of death row.²⁷ Inmates are no longer permitted to eat with each other, instead receiving food from guards through a slot in the door, and are ultimately segregated from other prisoners in every aspect of their lives. Unable to eat with other inmates, former inmate Anthony Graves recounts being passed food through a small slot in the door, analogizing the treatment of inmates to “trained dogs.”²⁸ “[Death row] became a rights-free zone after the 1998 escape ... [it is] terrible and absolutely inhuman.”²⁹ The conditions of confinement are so abhorrent that they have resulted in several inmates “volunteering” for execution; that is, dropping their appeals in order to reach their execution date sooner. It has been reported that more than 10% of the executions carried out since 1976 were of individuals who had dropped their appeals and “volunteered” for execution.³⁰ One former death row inmate describes the conditions of Texas’s death row as the worst imaginable, stating that the system is “literally driving men out of their minds.”³¹ Another Texas inmate characterizes prolonged solitary confinement as “barbaric and harmful at every level,” describing his own experience as

24 Dave Mann, *Solitary Men: Does prolonged isolation drive death row inmates insane?*, TEXAS OBSERVER (Nov. 10, 2010), <https://www.texasobserver.org/solitary-men/>.

25 The inmate, Martin E. Gurule, was found dead a week later by police officers.

26 *The Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.

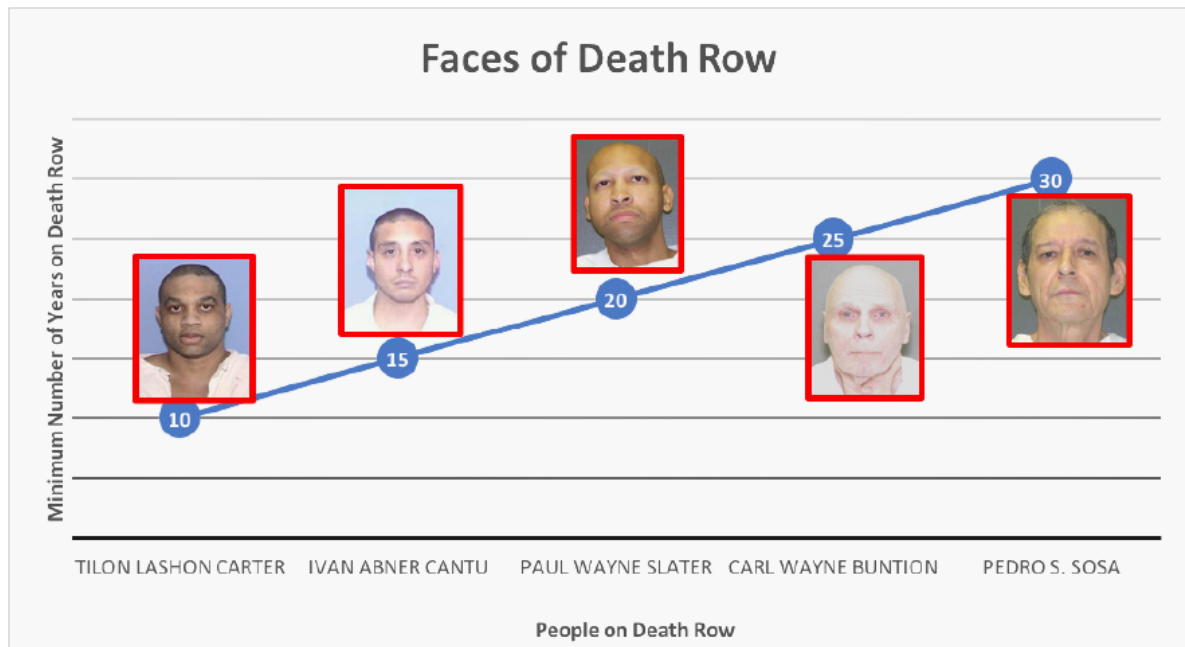
27 *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Human Rights on the S. Comm. on the Judiciary*, (2014) (submission from the American Civil Liberties Union of Texas, Texas Civil Rights Project, and Texas Defender Service), <http://solitarywatch.com/wp-content/uploads/2014/02/TX-Death-Row-ACLU-of-TX-TCRP-TDS.pdf>.

28 *Reassessing Solitary Confinement: The Human Rights, Fiscal and Public Safety Consequences: Hearing Before the Subcomm. On the Constitution, Civil Rights, and Human Rights on the S. Comm. On the Judiciary*, (2012) (testimony by Anthony C. Graves) [hereinafter Anthony Graves testimony].

29 Telephone interview with Brian Stolarz, attorney, and Alfred Dewayne Brown, exonerated former Texas Death Row Inmate (Dec. 2, 2016).

30 A Death Before Dying, *supra* note 20.

31 Anthony Graves testimony, *supra* note 28.



THE TEXAS TRIBUNE

“arbitrary, inhumane and unsafe.”³² In their questionnaire responses, inmates frequently expressed the sentiment of feeling dehumanized or treated like an animal.³³ As one former resident of the Polunsky Unit writes, “we are objects, not people.”³⁴

Conditions on death row—particularly the mandatory use of solitary confinement—are overly harsh and ultimately incompatible with international human rights law. The Inter-American Commission on Human Rights (IACHR)—an autonomous body of the Organization of American States (OAS) charged with monitoring human rights in the Americas—has developed clear standards for segregation, similarly to other human rights bodies, “stating that solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the institution’s internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”³⁵ The American Bar Association has stated that prisoners should not be placed in solitary confinement for reasons other than personal safety, discipline, medical care or mental health care. If segregated, it should be for “the briefest term and under the least restrictive conditions practicable.”³⁶ In stark contradiction to these standards, every individual on Texas’ death row now spends 22-23 hours per day alone, in a cell approximately 8 feet by 12 feet, for the entire duration of their sentence, which lasts more than a decade on average.³⁷ Although there is no universal standard for how big a prison cell should be, the IACHR has stated that

32 Response by Roderick K. Johnson to Human Rights Clinic questionnaire.

33 Responses by Nanon Williams, Adrian Estrada, Jose Brisenio, Gene Hathorn and Mariano J. Rosales to Human Rights Clinic questionnaire.

34 Response by Nanon Williams to Human Rights Clinic questionnaire.

35 IACHR, *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*, available at <http://www.oas.org/en/iachr/mandate/Basics/principlesdeprived.asp> [hereinafter IACHR Principles and Best Practices].

36 American Bar Association, *ABA Standards for Criminal Justice: Treatment of Prisoners* (2010), <http://www.abanet.org/crimjust/policy/midyear2010/102i.pdf>.

37 *Death Row Facts*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, https://www.tdcj.state.tx.us/death_row/dr_facts.html.

CASE STUDY

Alfred Dewayne Brown

Alfred Dewayne Brown spent more than a decade on Texas' death row, after being wrongfully convicted of capital murder in 2005. Brown was ultimately exonerated in June 2015.

Brown describes his time on death row as torture, recounting his complete segregation from other people for over a decade. Visitors were permitted for two hours at a time and needed to be placed in advance on his visitation list, which could only include ten people at any one time. With all visits conducted behind glass, Brown was deprived of physical contact with his family, and could not so much as shake the hand of his attorney until his release in 2015. He was also physically segregated from other inmates for the entire duration of his incarceration. He could shout to people in other cells. It was always incredibly noisy, which made it hard to think, let alone converse with others.



Alfred Dewayne Brown being released from prison in June 2015 (THE HUFFINGTON POST)

Apart from yelling, the only way inmates could interact with each other was to send “kites”; that is, attaching a note to a shoelace or piece of string to send it through to another cell. “If you get caught the guards will write you up, which you try to avoid happening, but you still take the chance as a way to communicate.”³⁸

Brown’s cell was a mere thirteen paces from the back wall to the front wall; if he spread his arms he could touch both walls at once, and could reach the ceiling by raising his arms. The cell contained one tiny window which he could only see out of by standing on his bunk, severely limiting available daylight. For some inmates, he recalls, their window simply looked onto the back of another cell. Brown was given only one blanket, which was too small to cover him. During the summer, it can get extremely hot due to the guards refusing to turn on the air conditioning. Only when a group of men got together to “complain”—which Brown described as including running when taken out of the cell, yelling, or throwing feces at the guards—would the guards turn it on. “[T]he Polunsky Unit strips you of your manhood ... you have no privacy whatsoever.” He describes constant strip searches, a practice which is unnecessarily degrading and can have a serious impact on inmates’ self-respect.

“The cell is designed to break you. It’s torture. The cell is torturing you, and the guards are picking on you and messing with you, and there’s nothing you can do about it.”

Further, Brown describes the lack of recreational or educational, explaining that inmates can request a book from the library, but they are never sure what they will receive and are permitted to

keep the book for a mere 24 hours. Certain authors and genres are not permitted in the prison, and Brown explains that inmates can be granted permission for a specific book from the mail room, only to be denied permission when it arrives. Inmates can purchase a radio from commissary with their own money, but it is of very poor quality. This is their primary means of communication with the outside world for the entirety of their stay.³⁹

“persons deprived of liberty shall have adequate floor space, daily exposure to natural light [and] appropriate ventilation and heating.”⁴⁰ As will be discussed later in this report, daily exposure to natural light for residents of the Polunsky Unit is rare. The cell contains only a sink, a toilet, and a steel thirty-inch-wide bunk with a thin plastic mattress.⁴¹ Inmates are able to look out of the small window in their cell only by rolling up their mattress and standing on it.⁴² Inmates often develop back problems from sleeping on the harsh steel bed, and they must use the toilet in their cell without any privacy, in plain sight of correctional officers.⁴³

“Visits keep an inmate alive. They keep you in tune with life and remind you to seek redemption, forgiveness and change. It’s the people that support us that we owe more than we owe ourselves.”⁴⁴

Not only does Texas hold all death row inmates in mandatory solitary confinement, the state also enforces a complete ban on “contact visits,” meaning that death row inmates are disallowed from physically touching their visitors.⁴⁵ The resulting consequences for inmates’ mental health and quality of life will be covered later in this report; however, in addition to the ban’s psychological impact, the non-contact rule often makes it hard for inmates to interact with their attorneys.⁴⁶ Brian Stolarz, the attorney responsible for Alfred Dewayne Brown’s exoneration from Texas’ death row, has explained that while there are no hourly restrictions on attorney visits, they are always conducted over a phone, through a plexiglass window.⁴⁷ Until Brown’s exoneration, Stolarz was not able to shake his hand once during the eight years he represented him. There is one private visitor booth but it is often occupied, meaning he was required to discuss a private case and have privileged conversations with his client within earshot of a number of other people. This often made it difficult to discuss the case in detail. Knowing the depth of the conditions to which his client was subjected, Stolarz would spend

38 Interview with Alfred Dewayne Brown, December 2016. Being “written up” is part of the disciplinary process, whereby a disciplinary action will be recorded in an inmate’s records if they are found to be acting in violation of any of the rules and regulations of the TDCJ. The written report will be forwarded to the supervisor and, if the incident cannot be resolved informally, a Disciplinary Report shall be filed, formally charging the offender with violating the TDCJ rule. See *Disciplinary Rules and Procedures for Offenders*, TEXAS DEPARTMENT OF CRIMINAL JUSTICE (2015), https://www.tdcj.state.tx.us/documents/cid/Disciplinary_Rules_and_Procedures_for_Offenders_English.pdf.

39 Interview with Alfred Dewayne Brown, December 2016.

40 IAHCRC Principles and Best Practices, *supra* note 35.

41 Anthony Graves testimony, *supra* note 28.

42 *Id.*

43 *Id.*

44 Response by Kenneth E. Foster Jr to Human Rights Clinic questionnaire.

45 A Death Before Dying, *supra* note 20.

46 Responses by Christian Olsen and Jose Briseno to Human Rights Clinic questionnaire.

47 Telephone interview with Brian Stolarz, *supra* note 29.

as much time as possible at the Unit during each visit. Stolarz describes the fact that attorneys were permitted to bring money for the vending machines as one of the few humane aspects of the visitation. This allowed attorneys to effectively have a meal with their clients, which helped establish a human connection in the non-contact environment. This privilege, however, had been terminated by the time Brown was released.⁴⁸



A typical death row cell in the Polunsky Unit. (MOTHER JONES)

The UN “Standard Minimum Rules for the Treatment of Prisoners,” also known as the Mandela Rules, the most authoritative rules available representing the international consensus on prison conditions, require that “every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily.”⁴⁹ TDCJ policy⁵⁰ permits inmates 1-2 hours of recreation time per day, but after surveying and interviewing inmates, the ACLU has concluded that in practice, death row inmates often do not receive outdoor recreation time.⁵¹ Inmate responses to the clinic support this conclusion.⁵² Of those prisoners who are awarded some recreation time, this often merely involves being moved from their cell to a “dayroom” or “cage” for one hour per day; they remain alone in that space for the entire duration of their “recreation” time.⁵³ Several inmates who have had their capital sentences reduced to life imprisonment spent time on death row in both the Ellis Unit and the Polunsky Unit. One inmate, Anthony Pierce, describes the difference between the two units in terms of recreation time. He explains that prior to 1999 at the Ellis Unit, he was given recreation time five days a week for around three hours a day, and was able to recreate with other inmates. During that time, he had access to the outdoors and sunlight. Upon being moved to Polunsky, group recreation was terminated and sunlight was a “rare occurrence”, as he was permitted outdoor recreation only once a week, for one hour.⁵⁴ Several inmates echoed Pierce’s complaint about lack of sunlight.⁵⁵ Due to the configuration of the “outside yard,” a small enclosure with high concrete walls and a metal grate caging in the top, “[t]he sun had to be right above you to be able to catch any of it,” or there would be “no sunlight due to bars.”⁵⁶ Indeed, several of the inmates describe the difference

48 Telephone interview with Brian Stolarz, *supra* note 29.

49 United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules), U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 4, 2015) [hereinafter *Mandela Rules*] at rule 23(1).

50 American Civil Liberties Union and Texas Civil Rights Project, *A Solitary Failure: The Waste, Cost and Harm of Solitary Confinement in Texas* (2015), https://www.texascivilrightsproject.org/en/wp-content/uploads/2016/04/tcrp2015_solitary.pdf [hereinafter *Solitary Failure*].

51 *Id.*

52 Responses by Whitney Lee Reeves, Efrain Perez, John Dewberry, Walter Bell, Jr., Nanon Williams, Mariano J. Rosales, Anthony Pierce, Gene Hathorn, Fernando Garcia, Kenneth Foster, Jr., and Adrian Estrada to Human Rights Clinic questionnaire.

53 See *Id.*; *Solitary Failure*, *supra* note 50.

54 Response by Anthony Pierce to Human Rights Clinic questionnaire.

55 Responses by Whitney Lee Reeves, Miguel Angel Martinez, Gene Hathorn, Mariano J. Rosales and Nanon Williams to Human Rights Clinic questionnaire.

56 Responses by Mariano J. Rosales and Nanon Williams to Human Rights Clinic questionnaire.

between Ellis Unit and Polunsky Unit as being “night and day.”⁵⁷ Prior to being moved to the Polunsky Unit, Kenneth E. Foster, Jr. was on death row at the Ellis Unit, where he was permitted to work and had group recreation time. Upon being moved to the Polunsky Unit, Foster was permitted outside recreation only twice a week. He explains that often, the guards would refuse to take inmates outside “simply because they knew death row inmates enjoyed the ‘outside yard,’” which Foster describes as a “kennel size[d] space with stone walls that extend maybe 30 feet into the air.”⁵⁸ When asked about opportunities for outdoor recreation, many of the inmates gave similarly critical responses and several referred to “outside” using quotation marks.⁵⁹ Inmates with disciplinary infractions on Texas’ death row can be placed in even harsher conditions of segregation than the standard segregation units, described as “Level 3,” where they are deprived not only of contact, daylight, recreation and television, but of radios, fans, and alarmingly, hygiene products such as toothpaste.⁶⁰

The Mandela Rules prescribe that provision shall be made for the further education of inmates and that education of illiterate inmates is compulsory.⁶¹ The UN Office of the High Commissioner on Human Rights (OHCHR) has reiterated this rule, stating that “education and cultural activities shall be provided and encouraged, including access to an adequate library.”⁶² Despite this standard, inmates on Texas’ death row cannot work nor are they entitled to any form of education, and thus spend every day of their lives, from sentencing to execution, in complete isolation. Kenneth Foster explained that the prison did not provide any educational materials; inmates’ access to such materials entirely depended on the support they had from outside. According to Foster, “you were there simply to exist until your execution arrived.”⁶³ In sum, prolonged and mandatory solitary confinement is “disproportionate, illegitimate and unnecessary.”⁶⁴ Texas has not advanced any specific justifications for the indiscriminate and harsh use of solitary confinement.

ii. SOLITARY CONFINEMENT IN THE CAPITAL PUNISHMENT SYSTEM: TEXAS IN COMPARISON

AS PREVIOUSLY EXPLAINED, solitary confinement is the practice of isolating individuals in small cells for twenty-two to twenty-four hours a day.⁶⁵ Although prisons throughout the U.S. utilize solitary confinement, it is important to examine the specific practices that cause Texas’ imposition of solitary confinement in the capital punishment system to stand out as particularly draconian.

There are currently more than 3,000 prisoners confined on death rows in 35 states, with the

57 Responses by Whitney Lee Reeves, John Dewberry and Christian Olsen to Human Rights Clinic questionnaire.

58 Response by Kenneth E. Foster, Jr. to Human Rights Clinic questionnaire.

59 Responses by Whitney Lee Reeves, Efrain Perez, John Dewberry, Walter Bell, Jr., Nanon Williams, Mariano J. Rosales, Anthony Pierce, Gene Hathorn, Fernando Garcia and Adrian Estrada to Human Rights Clinic questionnaire.

60 Elisa Mosler, *Texas Lockdown: Solitary Confinement in the Lonestar State*, SOLITARY WATCH (July 6, 2011) <http://solitarywatch.com/2011/07/06/solitary-confinement-in-texas-a-long-way-to-reform/>

61 Mandela Rules, *supra* note 49, at rule 104.

62 Office of the United Nations High Commissioner for Human Rights, *Human Rights and Prisons, A Pocketbook of International Human Rights Standards for Prison Officials* (2005), <http://www.ohchr.org/Documents/Publications/training11Add3en.pdf>.

63 Response by Kenneth E. Foster, Jr. to Human Rights Clinic questionnaire.

64 IACHR, Report No. 44/14, Case 12.873. Merits (Publication). Edgar Tamayo Arias, United States. July 17, 2014. OEA/Ser.L./V/II.151, doc. 9 ¶ 182.

65 *The Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.

majority of these inmates being held in solitary confinement.⁶⁶ The bulk of these inmates are held in solitary confinement based purely on their capital conviction, rather than for reasons related to discipline, security, or crime.⁶⁷ Texas' practice of imposing mandatory solitary confinement on individuals convicted of a capital crime bears no relation to safety or discipline, factors which should be considered when imposing segregation. In recent years, states such as Missouri, North Carolina, and Colorado have abolished such mandatory practices⁶⁸. Death row conditions can vary widely, from extremely restrictive to identical to general population prisons. Although the specific conditions of inmates on death row in each death penalty state have proven difficult to track, as states are not required to report on such matters, it is clear nevertheless that Texas' death row is significantly more restrictive than other states.⁶⁹ In *Block v. Rutherford*, the Supreme Court held that prison officials had the right to enforce a general ban against any kind of "contact visit" for individuals on death row; that is, visits from family and friends where inmates can physically hug and touch their visitors.⁷⁰ Texas has made sweeping use of this ruling, completely banning any contact visits with family or attorneys for death row inmates, even at the final visit on the day of execution.⁷¹ In comparison, California, Alabama, Georgia, Missouri, Nevada, Ohio, and Indiana all allow contact visits with both family members and attorneys. Arkansas and Louisiana allow contact visits with family members, while Colorado, Idaho, New Jersey and Oklahoma allow contact visits with attorneys.⁷² In Texas, inmates are only able to connect with their loved ones through a glass screen, and are not permitted to make phone calls to their families or attorneys, unlike prisoners in general population. This has a profound effect not only on the inmates themselves, but on the family and friends who suffer alongside their loved ones. Further, Texas is one of only two states—the other being Oklahoma—that does not permit death row inmates access to any television, effectively barring inmates who cannot afford radios from the outside world.⁷³

Inmates on Ohio's death row are housed at the Chillicothe Correctional Institution, which is comprised of three separate units. While inmates are housed in individual cells, each unit has a common area for all inmates, which includes tables and recreation equipment, a television, books, and board games.⁷⁴ Inmates are permitted access to the recreation rooms daily. This contrasts dramatically with Texas's death row, where no recreational materials or group recreation is provided. A survey completed in 2014 found that the majority of inmates on Ohio's death row felt that they received adequate clothing and bedding, and were given access to showers regularly.⁷⁵

66 A Death Before Dying, *supra* note 20.

67 *Id.*

68 Death Penalty News, U.S.: *Rethinking solitary confinement for death row inmates*, June 11, 2015. <https://deathpenaltynews.blogspot.com/2015/06/us-rethinking-solitary-confinement-for.html>. See also, The Arthur Liman Public Interest Program Yale Law School, *Rethinking "Death Row": Variations in the Housing of Individuals Sentenced to Death*, New Haven, (July 2016) https://law.yale.edu/system/files/documents/pdf/Liman/deathrow_reportfinal.pdf

69 Alanna Durkin, *Virginia just made death row a little easier*, US News (Oct 2015), available: <http://www.usnews.com/news/us/articles/2015/10/16/virginia-quietly-grants-death-row-inmates-new-privileges>

70 *Block v. Rutherford*, 468 U.S. 576, 587 (1984).

71 A Death Before Dying, *supra* note 20.

72 *Death Row Conditions*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/documents/DeathRowConditions.xls>

73 Anthony Graves Testimony, *supra* note 28.

74 CORRECTIONAL INSTITUTION INSPECTION COMMITTEE REPORT ON THE INSPECTION AND EVALUATION OF CHILLICOTHE CORRECTIONAL INSTITUTION (March 2014), available: <http://www.ciic.state.oh.us/docs/Chillicothe%20Correctional%20Institution%202014.pdf> [Hereinafter Chillicothe Report]

75 *Id.*

Inmates felt that they had positive relationships with staff, guards and the warden, with one inmate adding that he was always treated with respect.⁷⁶ This is a stark difference compared to inmates' reported relationships and interactions with the guards on Texas' death row, where the problematic relationship between inmates and guards has a significantly detrimental impact on many of the inmates' day-to-day lives, particularly in terms of medical care, an issue which will be discussed later in this report.⁷⁷

Virginia—a state which once rivalled Texas for dire death row conditions—has begun the process of granting more humane conditions to inmates housed on death row. Previously, inmates were permitted to leave their cells only three times a week for showers. They were permitted only five hours of recreation time per week which, much like the current situation in Texas, entailed simply being moved to a larger cell. Additionally, inmates were prohibited from contact visits. Following a number of legal challenges to the conditions on Virginia's death row, the situation today appears to be somewhat improved. Inmates receive more recreation time and are permitted to recreate with other inmates outside their cells for up to an hour each day. Inmates are now permitted to watch television, use the telephone and, importantly, are permitted contact visits with relatives.⁷⁸ Inmates on Ohio's death row are allowed access to telephones and visits from friends and family. Inmates also made a point of mentioning the windows in their cells which provide daylight, and which they are able to open so they can feel fresh air, a significant difference from inmates on Texas' death row, who barely see any daylight and are almost never able to feel fresh air.⁷⁹ Inmates on Missouri's death row are not only housed with general population prisoners, but have access to telephones and are offered the same education and recreational programs as other prisoners.⁸⁰ Inmates at the Polunsky Unit in Texas have no access to telephones, and as previously explained, are prohibited from any contact visits whatsoever.⁸¹ Protocol on Texas' death row is demonstrably more severe than that of states such as Ohio and Missouri. It was reported in 2014 that 10 states adopted a number of measures aimed at reforming the use of solitary confinement in prisons.⁸² Texas is not one of those states and continues to violate both domestic and international human rights standards.

iii. DEATH ROW SYNDROME

SIGNIFICANT RESEARCH HAS shown that prolonged solitary confinement not only exacerbates pre-existing mental health disorders, but also results in the development of new conditions in

76 Marc Kovac, *Capital News: Survey gives public a peek at death row conditions*, Twinsburg Bulletin (May 2014), available: <http://www.twinsburgbulletin.com/opinion/2014/05/29/capital-news-survey-gives-public-a-peek-at-death-row-conditions>

77 Responses by Gregory Van Alstyn, Whitney Lee Reeves, Efrain Perez, John Dewberry, Mark Arthur, Nanon Williams, Christian Olsen, Miguel Angel Martinez, John Herrin, Gene Hathorn, Fernando Garcia, Adrian Estrada, David DeBlanc and Jose Briseno to Human Rights Clinic questionnaire.

78 Alanna Durkin, *Virginia just made death row a little easier*, *supra* note 69.

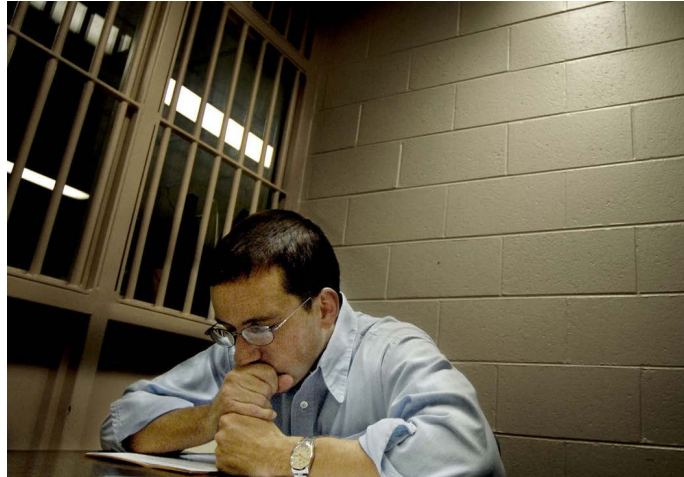
79 Mark Kovac, *Capital News: Survey gives public a peek at death row conditions*, *supra* note 76.

80 *Id.*

81 *A Death Before Dying*, *supra* note 20.

82 Eli Hager & Gerald Rich, *Shifting Away from Solitary*, The Marshall Project (Dec. 12, 2014), <https://www.themarshallproject.org/2014/12/23/shifting-away-from-solitary#.TZ4wKsc1s>

otherwise unaffected individuals.⁸³ Indeed, it has been found that about one-third of prisoners in solitary confinement develop some form of severe mental illness.⁸⁴ The combination of the dehumanizing conditions on death row—such as long-term isolation and lack of human contact—and the length of time inmates spend awaiting death has extremely detrimental effects on the individuals' well-being.⁸⁵ This has come to be known as the death row phenomenon. Death row syndrome, however, is the term used to describe the psychological trauma which occurs as a result of the death row phenomenon.⁸⁶ The concept is believed to have first been defined in *Soering v United Kingdom*⁸⁷, where the European Court of Human Rights (ECtHR) held that exposure to the death row phenomenon, and consequent suffering of death row syndrome, was a violation of Article 3 of the European Convention on Human Rights (ECHR), specifically the right to be free from torture, inhumane or degrading treatment or punishment.⁸⁸ The European Court subsequently stated that the UK could not extradite the applicant to the United States if he would be subject to death row, as doing so would be equivalent to condemning the applicant to torture.



Jean Soering (THE VIRGINIAN-PILOT)

Inmates in solitary confinement report severe depression, memory loss, suicidal tendencies and an inability to relax, unable to keep track of time due to the tiny window and lack of natural daylight in the cell.⁸⁹ Many inmates are plagued by a number of symptoms and illnesses which they did not experience prior to their time on death row. Attorney Brian Stolarz reports that conditions of confinement broke a lot of people mentally.⁹⁰ Inmates held in solitary confinement are effectively subject to a severe form of psychological torture every day of their lives. One inmate described his experience with prolonged solitary confinement by stating that it “tends to alter reality for those who suffer the fate.”⁹¹ The same inmate reported multiple instances where his fellow inmates—some of whom had never previously exhibited signs of mental illness—made suicide attempts or severely injured themselves.⁹² Kenneth Foster, an inmate whose capital sentence was reduced to

83 *The Istanbul Statement on the Use and Effects of Solitary Confinement* (Dec. 9, 2007), http://solitaryconfinement.org/uploads/Istanbul_expert_statement_on_sc.pdf.

84 Dave Man, *supra* note 24.

85 *Id.*

86 *Time on Death Row*, DEATH ROW INFORMATION CENTER, <http://www.deathpenaltyinfo.org/time-death-row#drs>.

87 *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

88 European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 3, (Nov. 4, 1950), http://www.echr.coe.int/Documents/Convention_ENG.pdf.

89 *Solitary Failure*, *supra* note 50.

90 Telephone interview with Brian Stolarz, *supra* note 29.

91 Response by Gene Hathorn to Human Rights Clinic questionnaire.

92 *Id.*

life imprisonment, describes death row as a “slow mental, physical and spiritual torture.”⁹³ The severe isolation experienced as a result of complete segregation from other inmates is further exacerbated by the limitations on visits from family members.

“The isolation is really hard for me. Sometimes I feel desperate just to see or talk to another person ... I haven’t hugged my mother since 1998 ... The only time I feel another person’s touch is when a guard puts handcuffs on my wrist to take me to shower or recreation.”⁹⁴ — Rolando Ruiz, an inmate on Texas’ Death Row

In the case of Rolando Ruiz, expert testimony attested to the psychological effects of prolonged confinement on Texas’ death row. The expert testified to the fact that prolonged isolation often leads to anxiety, paranoia and hallucinations, depression, increased anger and lack of impulse control.⁹⁵ She discussed the disproportionate number of mentally ill individuals on death row, stating that the isolation and idleness exacerbates the condition, often resulting in psychotic episodes or suicide attempts. Indeed, it is reported that self-injury is eight times more likely, and suicide five times more likely, in Texas’ solitary-confinement facilities than in general population.⁹⁶ As a response to this, and similar situations in other states, a nationwide consensus appears to have been formed regarding exclusion of the mentally ill from solitary confinement. Despite this consensus and repeated calls by UN human rights bodies to end this practice,⁹⁷ Texas continues to mandate solitary confinement for every individual convicted of capital murder.

Given the research on the death row phenomenon and death row syndrome, it should come as no surprise that almost every inmate who replied to the questionnaire reported experiencing some degree of mental and emotional distress. In addition to anxiety, depression, anger, and suicidal thoughts, which were extremely common among the respondents, inmates described having frequent nightmares, losing their hair due to stress and developing paranoid delusions.⁹⁸ Not only did inmates report that solitary confinement had a profoundly negative effect on their mental health for the duration of their stay on death row, but many inmates reported that even years after leaving solitary confinement, they continue to suffer from long-term psychological effects as a result of their time spent in solitary.⁹⁹ Many had difficulty readjusting to life in general population. Some former death row inmates report suffering symptoms of posttraumatic stress disorder, depression or paranoia after their experience on death row, while others describe feeling uncomfortable around people or have a hard time sleeping with a cellmate in the room.

93 Response by Kenneth E. Foster, Jr. to Human Rights Clinic questionnaire.

94 Expert Report of Terry A. Kupers re: Rolando Ruiz, June 16, 2016, page 15. Brief for Applicant, *Ex parte Ruiz*, (Tex. Crim. App. 2016) [hereinafter Kupers Report].

95 *Id.*

96 Solitary Failure, *supra* note 50.

97 See, e.g., United Nations, Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 ¶ 20 (April 23, 2014), available at undocs.org/CCPR/C/USA/CO/4; United Nations, Committee Against Torture, *Concluding Observations on the Combined Third to Fifth Periodic Reports of the United States of America*, CAT/C/USA/CO/3-5 (19 Dec. 2014), available at undocs.org/CAT/C/USA/CO/3-5.

98 Responses by Adrian Estrada and Gene Hathorn to Human Rights Clinic questionnaires.

99 Responses by Whitney Lee Reeves, John Dewberry, Mark Arthur, Nanon Williams, Miguel Angel Martinez, Gene Hathorn, Kenneth E. Foster, Jr., Adrian Estrada, David DeBlanc and Carl Brooks to Human Rights Clinic questionnaire.



Anthony Graves testifying in 2012 (DEMOCRACYNOW.ORG)

CASE STUDY

Anthony Graves

In 1992, Anthony Graves was wrongfully convicted of murdering a woman and her four grandchildren in Somerville, Texas. Despite the fact that there was no physical evidence linking him to the crime, and the fact that his conviction was entirely based on false testimony, Graves spent 12 years on Texas' death row¹⁰⁰ and was given an execution date twice before his exoneration in 2010.¹⁰¹

Graves has spent the majority of his time and effort since his release advocating for a complete reform of the Texas capital punishment system, including a reassessment of the conditions on death row, including the mandatory imposition of solitary confinement.¹⁰² Testifying to the Senate Judiciary Committee Subcommittee on The Constitution, Civil Rights & Human Rights, Graves described the psychological impact that solitary confinement had on him and his fellow inmates.¹⁰³ He describes experiencing severe sleep deprivation due to the noise of inmates kicking and screaming, and explained that some men became paranoid and schizophrenic, unable to sleep due to hearing voices.¹⁰⁴ He witnessed multiple suicide attempts and testified that, "I would watch guys come to prison totally sane and in three years they don't live in the real world anymore."¹⁰⁵

Despite being released several years ago, Graves admits that he still suffers from the psychological injuries he sustained during his time on death row. "Solitary confinement does one thing; it breaks a man's will to live and he ends up deteriorating."¹⁰⁶

“But, I must admit that the 10 years on D/R [death row] has left me scarred mentally, psychologically and emotionally. It’s a daily struggle—for the most part I just want to be ‘alone.’ I love solitude. When I first got off D/R and was assigned to my 1st Unit...I couldn’t sleep in the same cage with anyone. I even went to the extreme of getting myself locked up [placed in administrative segregation] for 5 years after getting off D/R. That’s how badly I wanted to be alone. Till this day, I’m uncomfortable in the dayroom or being around lots of people.”¹⁰⁷

—Carl Brooks, a former inmate on Texas’ Death Row

During their stay on death row, inmates may long for the human contact they are deprived of, but after spending years in isolation, some individuals find themselves disturbed by close proximity to others. As Whitney Lee Reeves describes, “prior to being locked up I didn’t have a problem with shaking hands or someone clapping me or patting me on the back or shoulder. Now, I do not like to be touched, and only shake hands with very close friends.”¹⁰⁸ Some former death row residents eventually fully reacclimatize to life outside of solitary, but many inmates made statements to the effect that they believed themselves to be permanently scarred by their experiences at the Polunsky Unit.¹⁰⁹

v. TEXAS PRACTICE IS CONTRARY TO INTERNATIONAL HUMAN RIGHTS STANDARDS

a. Standards Against Inhuman Death Row Conditions

AS PREVIOUSLY DISCUSSED, many of TDCJ’s policies raise serious human rights concerns. It is a violation of the Convention Against Torture—to which the U.S. is a party—to intentionally inflict “severe pain or suffering, whether physical or mental ... for such purposes as punishing [a person] for an act he has committed.”¹¹⁰ The Convention provides that “Each State Party shall keep under systematic review...arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture¹¹¹...Each State Party shall...prevent...other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture.”¹¹² The

100 Graves was wrongfully imprisoned for a total of 18 years.

101 Texas Defender Service, *Press Release* (Feb. 8, 2016), <http://texasdefender.org/press-releases/>.

102 ANTHONY GRAVES FOUNDATION, <http://www.anthonygravesfoundation.org/>.

103 Anthony Graves testimony, *supra* note 28.

104 *Id.*

105 *Id.*

106 *Id.*

107 Response by Carl Brooks to Human Rights Clinic questionnaire.

108 Response by Whitney Lee Reeves to Human Rights Clinic questionnaire.

109 Responses by Carl Brooks, John Dewberry and Nanon Williams to Human Rights Clinic questionnaire.

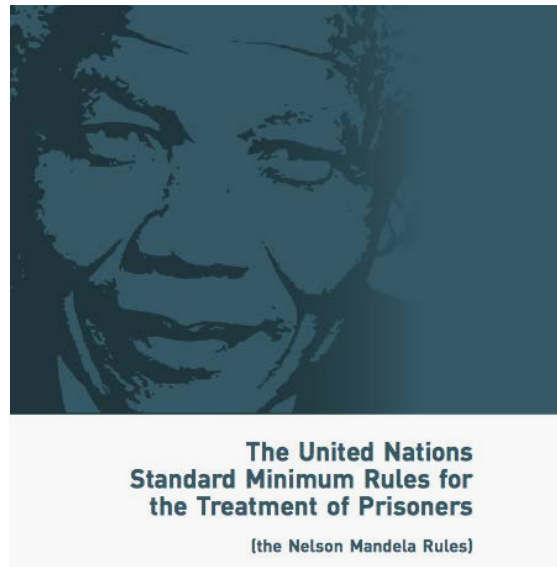
110 General Assembly Resolution 39/46, *Convention Against Torture and Other Cruel, Unhuman or Degrading Treatment or Punishment*, A/RES/39/46 art. 1 (June 26, 1987), available at undocs.org/A/RES/39/46.

111 *Id.*, art. 11

112 *Id.*, art. 16

United Nations Special Rapporteur on Torture,¹¹³ Juan Mendez, has noted the significant harms of solitary confinement: “Segregation, isolation, separation, cellular, lockdown, Supermax, the hole, Secure Housing Unit... whatever the name, solitary confinement should be banned by States as a punishment or extortion technique...Solitary confinement is a harsh measure which is contrary to rehabilitation, the aim of the penitentiary system.”¹¹⁴ The Special Rapporteur emphasized that any placement in solitary confinement for longer than 15 days should be prohibited.¹¹⁵ For Texas death row inmates, 15 days is infinitesimal compared to the average decade which they spend in solitary confinement where, according to one inmate, “anyone will develop psychological trauma.”¹¹⁶ In 2013, the Special Rapporteur stated that “no prisoner, including those serving life sentences and prisoners on death row, shall be held in solitary confinement merely because of the gravity of the crime.”¹¹⁷ Texas’ system of mandatory isolation for individuals convicted of capital murder clearly violates this standard.

The UN Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment has pointed out that prolonged solitary confinement may amount to an act of torture and other cruel, inhuman or degrading treatment or punishment.¹¹⁸ Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which the U.S. has ratified, states that prisoners have the right to family and correspondence. The Special Rapporteur on Torture has stated that “access to meaningful human contact within the prison and contact with the outside world are also essential to the psychological health of detainees held in



solitary confinement, especially those held for prolonged periods of time.”¹¹⁹ Texas’ ban on contact visits and the refusal to allow inmates to contact family members or attorneys via telephone is a clear violation of this standard. Under Article 7 of the ICCPR, incarcerated individuals are entitled to protection from torture and “cruel, inhuman or degrading treatment.”¹²⁰ They have a further right to be “treated with humanity and with respect for the inherent dignity of the human

113 An independent expert appointed by the UN Human Rights Council.

114 *Solitary confinement should be banned in most cases, UN expert says*, UN NEWS CENTRE (Oct. 18, 2011), <http://www.un.org/apps/news/story.asp?NewsID=40097#WCyEc3eZPVo>.

115 *Id.*

116 Response by Jorge Alfredo Salinas to Human Rights Clinic questionnaire.

117 United Nations, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/68/295 ¶61 (Aug. 9, 2013), available at undocs.org/A/68/295.

118 United Nations, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Optional Protocol, *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Republic of Paraguay*, (Jun. 7, 2010).

119 United Nations, Secretary-General Note, *Torture and other cruel, inhuman or degrading treatment or punishment*, A/66/268 ¶53 (Aug. 5, 2011) available at undocs.org/A/66/268.

120 International Covenant on Civil and Political Rights, art. 7.

person.”¹²¹

Similarly, the American Declaration on the Rights and Duties of Man states that every individual deprived of his liberty has the right to humane treatment during his incarceration,¹²² as well as the right not to receive cruel, infamous or unusual punishment.¹²³ For those OAS states which are not party to the American Convention on Human Rights,¹²⁴ the American Declaration is the source of international obligation related to the OAS Charter.¹²⁵ The U.S. is bound by way of customary international law. International human rights bodies have therefore found the U.S. to be in violation of the Declaration in terms of capital punishment on multiple occasions, with many cases originating in Texas. In the case of *Soering v United Kingdom*,¹²⁶ the European Court of Human Rights held that that the conditions of prolonged detention on death row (in Virginia) constituted “inhuman and degrading treatment” contrary to Article 3 of the European Convention on Human Rights. This included the use of prolonged solitary confinement, a practice which Virginia officials—much like their Texan counterparts—have repeatedly stated is required for ensuring prison safety.¹²⁷

Under Rule 14 of the Mandela Rules, there should be sufficient light to enable the detainee to work or read, and windows so constructed as to allow airflow whether or not artificial ventilation is provided.¹²⁸ The Special Rapporteur on Torture has specifically noted that the presence of windows and light is of critical importance to ensuring the standard, adequate treatment of inmates in solitary confinement.¹²⁹ As has been established, Texas continues to fall below this standard. The Mandela Rules completely prohibit “all cruel, inhuman or degrading punishments”, referencing corporal punishment and placement in a dark cell.¹³⁰ Presumptively, this would include the type of prolonged solitary confinement to which Texas inmates are subjected. Also included are rules relating to the right to education, physical and mental health care, and access to religious services. The UN and other international bodies have brought attention to the conditions of death row prisons in the U.S. on several occasions, and have issued both criticisms of the practice and recommendations for reform and improvement.

b. International criticisms and recommendations regarding U.S. and Texas practices

THE MANDATORY AND abusive use of solitary confinement in Texas and in other states has generated a long and consistent list of criticisms from a variety of international human rights

121 International Covenant on Civil and Political Rights, art. 10.

122 American Declaration on the Rights and Duties of Man art. XXV.

123 *Id.*, art. XXVI.

124 The U.S. has not ratified the Convention and is therefore not a party.

125 IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, March 23, 2015, OEA/Ser.L./V/II.154, doc. 5 ¶ 58.

126 *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (1989).

127 Matt Zapotosky, *Lawsuit threatens to upend solitary confinement on Va.'s death row*, Washington Post, June 2015. Available at: https://www.washingtonpost.com/local/crime/lawsuit-threatens-to-upend-solitary-confinement-on-vas-death-row/2015/06/06/bfd949ba-049f-11e5-8bda-c7b4e9a8f7ac_story.html

128 Mandela Rules, *supra* note 49, at rule 14.

129 United Nations, Secretary General Note, *Torture and other cruel, inhuman or degrading treatment or punishment*, *supra* note 119.

130 Mandela Rules, *supra* note 49, at rule 43.

mechanisms. The United Nations Working Group on Arbitrary Detention¹³¹ recently published a preliminary observation on arbitrary detention in the United States, where the members identified a myriad of issues within the criminal justice system. The Working Group, which visited Texas among other states, cited specific concern with the rate of use of solitary confinement, observing that the practice is widespread and of prolonged duration in some instances.¹³² The United Nations Human Rights Committee¹³³ has repeatedly raised issues with the tendency of the U.S. “to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment.”¹³⁴ The Human Rights Committee recommended that the United States “scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of Article 10 of the [ICCPR] and the [Mandela Rules].”¹³⁵ In its concluding observations on the fourth report of the U.S., the Human Rights Committee identified particular concerns with the use of prolonged solitary confinement in prisons, and with poor conditions in death-row facilities, recommending that the U.S. should “impose strict limits on the use of solitary confinement,” including abolishing the practice for prisoners with severe mental illness, and should “bring the detention conditions of prisoners on death row into line with international standards.”¹³⁶ Further, the UN Committee Against Torture¹³⁷ has expressed concern over the extensive use of solitary confinement in the United States, concluding that complete solitary isolation of 22 to 23 hours per day violates Article 16 of the Convention Against Torture.¹³⁸



IACHR, Hearings: “Case 12.644 – José Medellín Rojas (MC 317/06), Rubén Ramírez Cárdenas (MC 328/06) and Humberto Leal García (MC 349/06)” (JUAN MANUEL HERRERA - OAS/OEA)

The Inter-American Commission on Human Rights (IACHR), which is responsible for hearing cases and issuing decisions regarding the implementation of human rights in the Americas—including the U.S.—has similarly dealt with the issue of death row conditions in the United States, and particularly

131 Established by the UN Human Rights Commission to investigate cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the relevant international standards.

132 United Nations, Human Rights Committee, *Working Group on Arbitrary Detention: Preliminary Findings from its visit to the United States of America* (11-24 October 2016). Available at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20746&LangID=E>

133 The U.N. Human Rights Committee is an independent expert body charged with monitoring compliance by states with the ICCPR.

134 United Nations, Human Rights Committee, *Concluding observations of the Human Rights Committee*, CCPR/C/USA/CO/3/Rev.1 ¶ 32 (Dec. 18, 2006), available at undocs.org/CCPR/C/USA/CO/3/Rev.1.

135 *Id.*

136 United Nations, Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 ¶ 20 (23 April 2014), available at undocs.org/CCPR/C/USA/CO/4.

137 An independent expert body charged with monitoring implementation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by its State parties.

138 Convention against Torture, *supra* note 110.

in Texas.¹³⁹ In multiple cases the IACHR has opined that the use of solitary confinement should be reserved for exceptional circumstances, for the shortest amount of time possible, and as a measure of last resort.¹⁴⁰ In the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, the Inter-American Court of Human Rights established that prolonged solitary confinement constituted a failure to ensure “respect for the inherent dignity of the human person, regardless of the circumstance, and the right not to be subjected to cruel, inhuman or degrading treatment or punishment.”¹⁴¹



(THE TEXAS OBSERVER)

This is important precedent as the Commission tends to follow the standards developed by the Inter-American Court. Specifically, the IACHR has heard numerous cases related to the conditions of death row in Texas. In the case of Felix Rocha Diaz, the Commission found that the conditions on death row in Texas—including prolonged solitary confinement—constituted inhumane treatment, concluding that the U.S. was imposing “cruel, infamous and unusual punishment”

in violation of Articles XXV and XXVI of the American Declaration.¹⁴² Conditions referred to by the petitioners included the small, cramped cells holding only a sink, toilet and thirty-inch-wide bunk, as well as concerns over proper nutrition. Petitioners contended that breakfast is served at 3:00 am, meaning that inmates are forced to choose between sleeping through the night and missing a meal, or waking up in the middle of the night and suffering the physical and psychological consequences of sleep deprivation. As well as the complete lack of physical contact with family members, the petitioners submitted that friends and family are permitted only to write letters; the inmates’ attorney is the only person which they may receive phone calls from. Concern with disciplinary action within the prison was argued, with petitioners submitting that such action is often imposed for minor infractions such as possession of an extra bar of soap. Often there appears to be no reason at all. In light of these issues, and in conjunction with the severely detrimental effects which prolonged solitary confinement has on inmates, the Commission strongly recommended that the U.S. review its laws and practices related to solitary confinement in order to comply with international standards. It also recommended that the State suspend the utilization of solitary confinement as a court-imposed sentence in capital cases¹⁴³ In a similar case, the Commission stated the same, concluding that the

139 IACHR, Report No. 90/09, Case 12.644, Merits (Publication) Medellín, Ramírez Cárdenas and Leal García, United States, ¶ 60, Aug. 7, 2009.

140 IACHR, *Report on the human rights of persons deprived of liberty in the Americas*, OEA/Ser.L/V/II, doc. 64 ¶ 319, 407-418, Dec. 31, 2011.

141 *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 94, ¶ 154-156 (June 21, 2002).

142 American Declaration on the Rights and Duties of Man, art. XXV, XXVI.

143 IACHR, Report No. 11/15, Case 12.833, Merits (Publication), Felix Rocha Diaz, United States, OEA/Ser.L/V/II.154, doc. 5 ¶ 107, March 23, 2015.

measures employed by the state of Texas—such as the prohibition of any physical contact with family members and attorneys—were “disproportionate, illegitimate and unnecessary.”¹⁴⁴

In 2014, the Commission heard a case in which the petitioner argued that the conditions on Texas’s death row were harsher and more extreme than those found anywhere else in the country.¹⁴⁵ In addition to each of the issues raised in the *Rocha* case, it was alleged that prisoners with disciplinary issues, which usually include inmates with mental illness, were allowed outside of their cells for only 3-4 hours per week¹⁴⁶, rather than the minimum one hour per day as permitted by TDCJ. Additionally, it was alleged that inmates receive no educational or occupational training, and that inmates with disciplinary problems are often deprived of their radios, effectively cutting off their connection with outside world completely.¹⁴⁷ The U.S. argued that “conditions of confinement in death row are difficult but reasonable under the circumstances and do not constitute cruel and unusual punishment.” In terms of solitary confinement, the U.S. argued that an inmate on death row is provided with the highest level of internationally recognized protection due to the State’s appeals process. On this point, the U.S. alleges that an inmate’s full exercise of his legal right to appeal avenues is the reason an inmate spends so long on death row which, according to the U.S., means “he should not then claim that the conditions of confinement during that delay are cruel, infamous, or unusual punishment.”¹⁴⁸ Again, the Commission found the conditions of death row in Texas to be human rights abuses in violation of the American Declaration on the Rights and Duties of Men. Specifically, the IACHR stated that to be in line with international human rights standards, those deprived of liberty on death row should not be subjected to solitary confinement as a regular condition of imprisonment. Solitary confinement, they reiterated, should be imposed only in exceptional circumstances and solely as a disciplinary punishment in those instances and under the same conditions in which these measures apply to the rest of the inmates.¹⁴⁹ The Commission went on to state that “the conditions of imprisonment of persons sentenced to death must meet the same international norms and standards that apply in general to persons deprived of liberty... regardless of the nature of the conduct for which the person in question has been deprived of his liberty.”¹⁵⁰ The Commission concluded that by imposing prolonged solitary confinement on an inmate, “the United States is subjecting him to inhumane treatment during his incarceration and imposing cruel, infamous and unusual punishment, in violation of Articles XXV and XXVI of the American Declaration.” The Commission further cited the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas:

Solitary confinement shall only be permitted as a disposition of last resort and for a strictly limited time, when it is evident that it is necessary to ensure legitimate interests relating to the

144 IACHR, Report No. 52/13, Cases 11.575, 12.333, & 12.341, Lackey et al., United States, ¶ 236 (2013).

145 IACHR, Report No. 44/14, Case 12.873, Merits (Publication) Edgar Tamayo Arias, United States, OEA/Ser.L./V/II.151, doc. 9 ¶ 39, July 17, 2014.

146 *Id.*, ¶ 37

147 *Id.*

148 *Id.*, ¶ 66

149 *Id.*, ¶ 172

150 *Id.*, ¶ 181

institution's internal security, and to protect fundamental rights, such as the right to life and integrity of persons deprived of liberty or the personnel.”¹⁵¹

The Commission condemned the practice of holding a prisoner in prolonged solitary confinement solely because he had been sentenced to death, along with the general prohibition on physical contact, as “disproportionate, illegitimate and unnecessary,”¹⁵² and recommended that Texas should review its laws, procedures and practices to ensure that solitary confinement is not imposed as a court-ordered sentence but is reserved for “only the most exceptional circumstances.” The Commission further recommended that Texas reinstate contact visits for death row inmates and ensure “access to various programs and activities.”¹⁵³

vi. ACCESS TO RELIGIOUS SERVICES AND MATERIALS

THE RIGHT TO free exercise of religion is a fundamental right both under the U.S. Constitution¹⁵⁴ and international law.¹⁵⁵ The Religious Land Use and Institutionalized Persons Act, which applies to state prison systems, also guarantees heightened protection of religious practice within prison systems.¹⁵⁶ In addition to general condition standards, international customary law also addresses a right to physical safety and health care. The American Declaration of the Rights and Duties of Man asserts that “[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private.”¹⁵⁷ Furthermore, the International Covenant on Civil and Political Rights states:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others¹⁵⁸

Despite these protections, death row inmates receive only sporadic access to religious services and advisors.

151 IACHR Principles and Best Practices, *supra* note 35 at principle XXII (3).

152 Edgar Tamayo Arias, *supra* note 145, ¶ 182.

153 *Id.*, ¶ 194.

154 U.S. CONST. AMEND. I.

155 ICCPR, art. 18

156 A Death Before Dying, *supra* note 20.

157 American Declaration of the Rights and Duties of Man, art. III.

158 International Covenant on Civil and Political Rights, art. 18.

Olsen, a former TDCJ death row inmate, described the chaplain's office as "a joke," explaining that religious services were essentially non-existent.¹⁵⁹ Another inmate reiterated the lack of services, stating that the extent of access to religious reading material was Bibles that could be requested from the prison chaplain.¹⁶⁰ One inmate who had spent time on death row when it was housed in the Ellis Unit, and after the move to Polunsky, compared his experiences before and after 1999, emphasizing that when at the Ellis Unit, religious services for a variety of religions were common.¹⁶¹ Following the move to Polunsky, however, they all stopped.¹⁶² While one inmate stated that the inmates were allowed to talk to religious volunteers who took the time to visit,¹⁶³ another inmate stated that these volunteer ministers would usually only come around during the holiday season.¹⁶⁴ Several other inmates claimed that the only access to religious services was through outside persons mailing in religious materials.¹⁶⁵

"The only access you received to any material was what TDCI allowed to come in through the mail...You were there simply to exist until your execution arrived. Your ability to receive anything depended on the support you had from the outside or what a neighbor may give you."

— Kenneth Foster, a former death row inmate¹⁶⁶

Inmates who belonged to religions other than Christianity seemingly faced even greater barriers to religious services or materials, with Anthony Pierce explaining that due to his Islamic faith, he was not provided with any religious materials.¹⁶⁷ According to Pierce, Christian inmates were given priority, creating "a harsh environment regarding the religious needs of the Muslim community." Other inmates' accounts confirm Pierce's remonstrance. Gene Hathorn, who spent more than a decade on Texas' death row, has detailed that although an inmate may send a request to the Chaplain, his Hindu faith meant that the Chaplain had no materials relevant to his beliefs.¹⁶⁸

In a joint petition to TDCJ in 2014, several organizations signed a letter urging some systematic changes be made to death row procedures.¹⁶⁹ Prior to the move to the Polunsky Unit, male death row inmates participated regularly in communal religious services. One of the suggested revisions is the resumption of these community services.¹⁷⁰ Included in the list of support letters is a message from the Catholic Diocese of Beaumont, which expressed concern that there are often serious impairments to Chaplains being allowed to visit inmates on death row because of

159 Response by Christian Olsen to Human Rights Clinic questionnaire.

160 Response by Adrian Estrada to Human Rights Clinic questionnaire.

161 Response by Deryl Wayne Madison to Human Rights Clinic questionnaire.

162 *Id.*

163 Response by Guy Alexander to Human Rights Clinic questionnaire.

164 Response by Jorge Alfredo Salinas to Human Rights Clinic questionnaire.

165 Responses by Carl Lee Brooks Jr., Mark S. Arthur and Miguel Angel Martinez to Human Rights Clinic questionnaire.

166 Response by Kenneth Foster to Human Rights Clinic questionnaire.

167 Responses by Anthony Pierce, Whitney Lee Reeves, David Allen Gardner, Nanon Williams, Christian Olsen, Miguel Angel Martinez, Deryl Madison, Gene Hathorn, Fernando Garcia, Adrian Estrada and David DeBlanc to Human Rights Clinic questionnaire.

168 Response by Gene Hathorn to Human Rights Clinic questionnaire.

169 Letter from American Civil Liberties Union of Texas, Texas Civil Rights Project, Texas Coalition to Abolish the Death Penalty, Texas Criminal Justice Coalition, Texas Defender Service and Texas Impact, to Brad Livingston, Exec. Director, Texas Department of Criminal Justice (Jan. 27, 2014) (on file with the Human Rights Clinic).

170 *Id.*

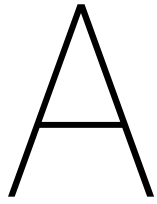
a lack of available guards to escort the visiting Chaplains and facilitate the visit.¹⁷¹ The Diocese proposed that a Certified Volunteer Chaplain be screened and approved by TDCJ and allowed to visit without the need for a prison guard escort.¹⁷² This proposal directly reflects one inmate's concern that the structure at TDCJ "isn't designed to create access" for volunteers.¹⁷³

171 Letter from Deacon Thomas Ewing, Jr., Director, Office of Criminal Justice, Catholic Diocese of Beaumont, to Texas Department of Criminal Justice (Jan. 21, 2014) (on file with the Human Rights Clinic).

172 *Id.*

173 Response by Nanon Williams to Human Rights Clinic questionnaire.

REPEATED CALLS UP TO EXECUTION



AS WILL BE DISCUSSED IN DETAIL BELOW, STATUTORY DEFICIENCIES PRESENT IN TEXAS' Code of Criminal Procedures force death row inmates to prepare for execution on multiple occasions, causing legal difficulties and lasting psychological damage for the inmates. Texas' practice of scheduling inmates for multiple execution dates is problematic under international human rights standards, and has even garnered attention in international courts. Under the ICCPR, persons deprived of liberty are entitled to protection from torture and "cruel, inhuman or degrading treatment,"¹⁷⁴ as well as a guarantee they will be "treated with humanity and with respect for the inherent dignity of the human person."¹⁷⁵ To best address the problem, it is essential to understand how the scheduling of executions operates.

i. STATUTORY DEFICIENCIES

IN ADDITION TO living in torturous perpetual solitary confinement, inmates are forced to prepare for execution multiple times because of the statutory allowances in Texas' execution scheduling process. According to Texas' Code of Criminal Procedure, there is no prohibition on scheduling an inmate for execution when post-conviction measures are still pending, including federal habeas petitions.¹⁷⁶ Another major flaw in Texas' procedural rule is that an inmate's defense attorney is not required to be notified of scheduling requests for executions.¹⁷⁷ In fact, it is specified that defense counsel is not required to be notified of an execution date until after it is set.¹⁷⁸ This leads to executions being scheduled prematurely, unnecessarily burdening inmates by forcing them to prepare for execution multiple times.

In fact, last-minute stays of execution can fairly be described as a core element of the capital punishment system. Media headlines like "Texas inmate who didn't kill anyone gets stay of execution,"¹⁸⁰ "Texas hit man gets second stay of execution,"¹⁸¹ "Houston cop killer Haynes granted stay of execution,"¹⁸² "Texas Court of Criminal Appeals stays execution of Robert Jennings," and "Prison Guard's Convicted Killer Wins Another Execution Stay"¹⁸³ are common. Last minute stays of execution are so routinely expected that the Texas statute mandates all executions be scheduled

174 ICCPR art. 7.

175 ICCPR art. 10.

176 Texas Code of Crim. Pro. 43.141.

177 Texas Code of Crim. Pro. 43.141(b-1).

178 Texas Code of Crim. Pro. 43.141(b-1).

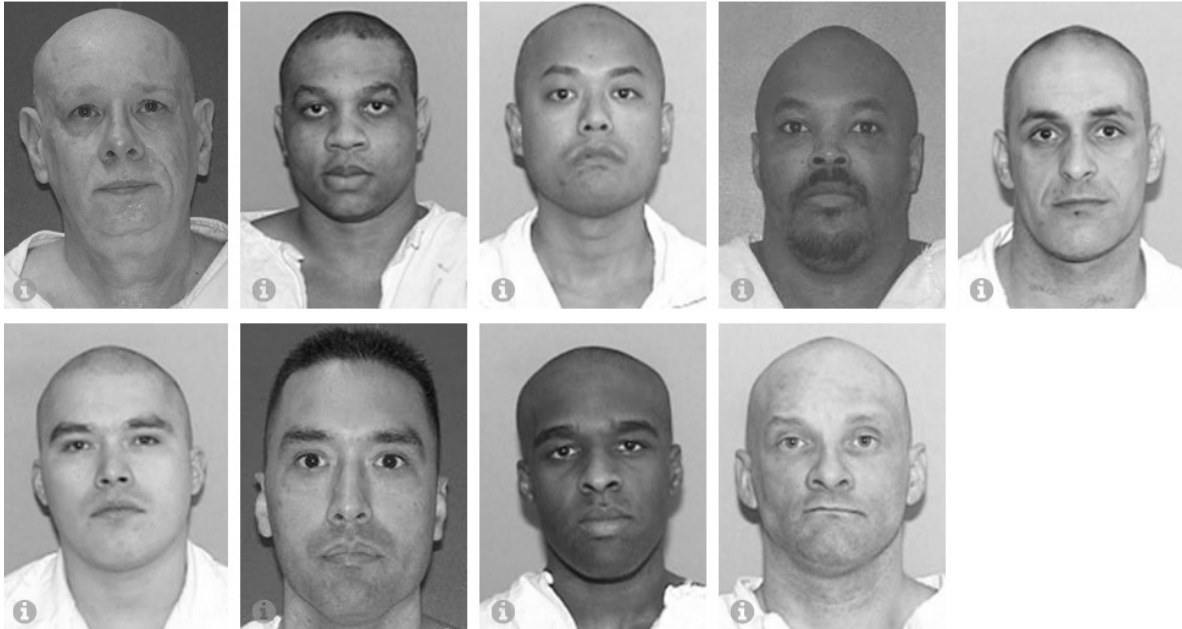
179 McCullough & Hasson, *supra* note 1.

180 Khushbu Shah and Polo Sandoval, *Texas Inmate Who Didn't Kill Anyone Gets Stay of Execution*, CNN (Aug. 19, 2016), <http://www.cnn.com/2016/08/19/us/texas-execution-jeff-wood/>.

181 *Texas hit man gets second stay of execution*, FOX NEWS (Aug. 27, 2016), <http://www.foxnews.com/us/2016/08/27/texas-hit-man-gets-second-stay-execution.html>.

182 Allan Turner, *Houston cop killer Haynes granted stay of execution*, HOUSTON CHRONICLE (Jan. 27, 2016), <http://www.chron.com/news/houston-texas/houston/article/Houston-cop-killer-Haynes-granted-stay-of-3960930.php>.

183 Madeline Conway, *Prison Guard's Convicted Killer Wins Another Execution Stay*, TEXAS TRIBUNE (Aug. 11, 2016), <https://www.texastribune.org/2016/08/11/death-row-inmate-issued-another-stay-after-dna-test/>.



As of December 2016, these nine inmates have scheduled execution dates. From left to right: James Eugene Bigby, Tilon Lashon Carter, Kosoul Chanthakoummane, Terry Darnell Edwards, Steven L. Long, John Henry Ramirez, Rolando Ruiz, Paul David Storey, and Christopher Chubasco Wilkins. (THE TEXAS TRIBUNE)¹⁷⁹

after 6p.m. to accommodate them.¹⁸⁴ While these stays in execution come as a result of legitimate and successful legal challenges, the process of preparing for execution can be quite grueling on the psychological well-being of the inmates and their families.

Approximately 40% of the inmates surveyed for this report stated that they had been scheduled for execution at least once, and several inmates had been forced to prepare for execution multiple times.¹⁸⁵

“[P]risoners who are within 24 hours of being executed are moved to a special cell where they will have no contact with other prisoners.”¹⁸⁶ Expert witness psychiatrists have described the process as a “roller coaster: first they prepare for imminent death, then they put hope in an appeal.”¹⁸⁷ The Supreme Court itself has said that awaiting an execution date is “one of the most horrible feelings to which [a capital sentenced inmate] can be subjected.”¹⁸⁸ Some technical aspects of the process of preparation include choosing up to five family members and friends who will be present at the execution,¹⁸⁹ instructing family members that they must request their body within 48 hours after execution to bury,¹⁹⁰ and last-minute meetings with spiritual advisors, relatives, and attorneys.¹⁹¹ Even on the day of their execution, Texas exercises its cruelty and inhumanity by refusing inmates physical contact with their lawyer or family members.¹⁹²

184 Texas Rules of Crim. Pro. 43.14(a).

185 Responses by David Allen Gardner, Walter Bell, Jr., Charles Dean Hood, and Jose Briseno to Human Rights Clinic questionnaire.

186 Kupers report, *supra* note 94 at 8.

187 *Id.*

188 *Ruiz v. Texas*, No. 16-7792, at 1 (Mar. 7, 2017) (Breyer, J., dissenting) (citing *In re Medley*, 134 U. S. 160, 172 (1890)).

189 Texas Rules of Crim. Pro. 43.20.

190 Texas Rules of Crim. Pro. 43.25.

191 Texas Rules of Crim. Pro. 43.17.

192 IACHR, Report No. 133/11, Petition 259-11, Felix Rocha Diaz, United States ¶ 13 (2011).

CASE STUDY

Rolando Ruiz

Rolando Ruiz, a man convicted of capital murder in Bexar County, Texas, spent over 20 years on death row in Texas, 18 of which he spent in the Polunsky Unit.¹⁹³ Ruiz's case was stayed twice, once in 2007, and again just recently in 2016.¹⁹⁴ In 2007, Ruiz's execution was stayed mere minutes before the execution was scheduled to begin.¹⁹⁵



SAN ANTONIO EXPRESS NEWS

In regards to his mental process of preparation for execution, Ruiz described the grueling experience as follows,

"Driving to Huntsville where the death chamber is, I looked out the window at every tree, house, car, dog, cat, building, absolutely everything and anything that had to do with freeworld life—seeing things I never saw from my tiny cell on death row. Doing so brought so many overwhelming thoughts, feelings, and emotions...I experienced a tremendous sense of relief and gratitude to God when my execution was stayed, which I didn't learn until the night of my scheduled execution. But the experiences caused so much turmoil for me—not only because I had to personally come to terms with what I thought would be my death, but also because I watched what my family and friends went through. It was difficult to work through my own fear and feelings about dying, and it took a lot of time and prayer...I felt so overwhelmed as I watched my mother going through the pain of losing her one and only child."¹⁹⁶

Rolando Ruiz was executed on March 7, 2017.¹⁹⁷

One inmate, Gene Hathorn, who came within 13 hours of execution, described the experience as follows:

"I just tried to get mentally ready...if you're not ready there's nothing you can do about it, anyway. As for what [the state did], [they] put me under death watch to make sure I didn't deprive them of the killing right. [I was asked questions like what I wanted done with my body, what color clothes I wanted to be killed in, what I wanted for my last meal...It was surreal, because on an elemental level I knew that humans aren't supposed to be in the 'business' of killing other humans."¹⁹⁸

In addition to statutory deficiencies, inadequate representation for defendants in capital cases is a major contributing factor to the frequency of last-minute stays of execution and multiple execution

193 Bruce Selcraig, *Texas appellate court issues a stay of execution for San Antonio hit man*, SAN ANTONIO EXPRESS NEWS (Aug. 27, 2016), <http://www.expressnews.com/news/local/article/Texas-appellate-court-issues-a-stay-of-execution-9188516.php>.

194 *Id.*

195 Brief for Applicant, *Ex parte Ruiz*, at 77 (Tex. Crim. App. 2016).

196 Kupers report, *supra* note 94 at 16-17.

197 Jolie McCullough, *Texas executes triggerman in San Antonio murder-for-hire case*, Texas Tribune (Mar. 7, 2017), <https://www.texastribune.org/2017/03/07/texas-set-execute-triggerman-san-antonio-murder-hire-case/>.

198 Response by Gene Hathorn to Human Rights Clinic questionnaire.

dates. Structural problems with the way capital cases are assigned to defense attorneys, along with a lack of dedicated funding, results in a lack of adequate counsel for many capital defendants. In some cases, this has led to shockingly ineffective representation for defendants, for example an attorney who routinely slept during his clients' trials.¹⁹⁹ While theoretically an individual's appeal options should have been fully exhausted by the time an execution date is set, in practice the defense attorney has often failed to raise important legal or factual issues.²⁰⁰ While some individuals receive legal assistance from specialized organizations, often by the time these advocates take the case, an execution date has already been set and a last-minute stay is now the client's best hope.

iii. LASTING PSYCHOLOGICAL DAMAGE

FOR INMATES WHO have prepared for execution, the process leaves lasting psychological damage. When describing how preparing for his execution affected him, one inmate said,

"I was in the mindset of this is it...how am I going to react? Will I be able to look people in the eye and say last words? How was this going to affect my family? Part of me was scared and part of me wanted to go...I still think about it."²⁰¹

Another inmate said that an approaching execution date shook him to his core. "It made me feel that this country thought of me as less than human. It made me sad to see that I was where I was."²⁰²

A third inmate pointed out that although the experience of preparing for execution and receiving a last minute stay is intensely difficult, "[t]hey never offer any psychological help after being almost on the verge of being pronounced being told you are going to die by injection."²⁰³

iv. INTERNATIONAL HUMAN RIGHTS CRITICISM OF TEXAS' PRACTICES

OVER SEVERAL DECADES, advocates have brought Texas death penalty cases before the IACHR on a regular basis. While the majority of these cases focus on procedural deficiencies, advocates frequently raised concerns about prison conditions, and some pointed to the cruel situation of death row inmates in Texas being forced to prematurely, and in some cases repeatedly, prepare themselves for the process of execution.

In a 2013 IACHR case, advocates for Clarence Allen Lackey, a Texas death row inmate, emphasized to the Commission his multiple execution dates, arguing "that the alleged victim was forced to prepare himself for his imminent execution on five different occasions; two of his executions were stayed just hours before execution time."²⁰⁴ Despite precautionary measures issued in his case by the IAHCRC, Lackey was eventually executed on May 20, 1997 after an unsuccessful habeas corpus petition²⁰⁵ and almost 20 years on death row.²⁰⁶ While not ruling on the claim regarding the multiple

199 *Burdine v. Johnson* 262 F.3d 336, 341 (5th Cir. 2001).

200 *Lethally Deficient*, *supra* note 17.

201 Response by Deryl Wayne Madison to Human Rights Clinic questionnaire.

202 Response by Tony Nixon to Human Rights Clinic questionnaire.

203 Response by David DeBlanc to Human Rights Clinic questionnaire.

204 *Lackey et al. v. U.S.*, *supra* note 144 at ¶ 15.

205 *Id.* at ¶ 174.

206 *Id.* at ¶ 14.



THE NEW YORK TIMES

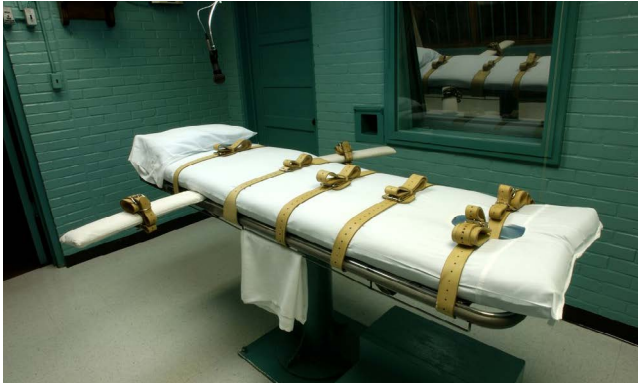
CASE STUDY

Kenneth E. Foster, Jr.

Kenneth E. Foster, Jr. was convicted in 1996 as a conspirator to a murder.²⁰⁷ Because Foster was sentenced to death despite the fact that he did not actually commit the murder in question, his scheduled execution sparked a great deal of protest and community activism, including a dedicated “Free Kenneth” website²⁰⁸ and numerous protests.²⁰⁹ Foster received a rare commutation by Governor Rick Perry in 2007, a decision that came just hours before he was slated to be executed, and is now serving a life sentence with TDCJ.²¹⁰ Foster described the experience in-depth, recalling,

“I was given an execution date...in May 2007. From that point I was placed in the death watch housing which is comprised [sic] of nothing but inmates with pending execution dates. ...There’s the change in scenery. There’s the paperwork the state needs for the disposal of your property and body. There’s the visits 3 days before your execution date with your family. There’s the talks you share with the guys around you. From May-August 30th my days were spent campaigning. I was able to build an international movement that saved my life...That paved the way for my sentence to be commuted by Governor Perry...[The experience] created a psychological problem later that became known as PTSD....It created a lot of rage inside me that I now use to keep fighting. It also created a lot of sadness in knowing how many went through that and still do. It’s a stain that sits on the soul daily [sic]...I’m still affected to this day. I’m still moving like I have an execution date. Because I do. I do because I am apart of humanity and as long as the death penalty exist[s] then we all have execution dates.”²¹¹

dates of execution, the IACHR ruled that the U.S. government had violated his “right to life, liberty and personal security, protected under Article I of the American Declaration, to the detriment of Clarence Allen Lackey...by virtue of its failure to comply with the precautionary measures that the IACHR granted for the alleged victims.”²¹² The Commission recommended the Texas government



Texas' execution chamber at the Wallis Unit in Huntsville, Texas.

(THE NEW YORK TIMES)

pay reparations to Lackey's family.²¹³

Petitioners in a 2003 IAHCR decision in the case of Shaka Sankofa, another Texas death row inmate who was ultimately executed in 2000 after 19 years on death row and multiple delays,²¹⁴ noted that “a condemned person suffers ‘undue psychological torture’ awaiting execution of a death sentence.”²¹⁵ Here, while the Commission again avoided ruling on the multiple delays, it determined that “the State is responsible for violations of Articles XVIII and XXVI of the American

Declaration in the trial, conviction and sentencing to death of Shaka Sankofa...by executing Mr. Sankofa based upon these criminal proceedings, the State is responsible for a violation of Mr. Sankofa's fundamental right to life under Article I of the American Declaration”²¹⁶ The Commission also ruled that Mr. Sankofa's family was entitled to reparations, including compensation.²¹⁷

207 Ralph Blumenthal, *Governor Commutes Sentence in Texas*, NY TIMES (Aug. 31, 2007), <http://www.nytimes.com/2007/08/31/us/31execute.html>.

208 *Free Kenneth*, <http://www.freekeneth.com> (last visited Mar. 29, 2017).

209 *Kenneth Foster Execution Protest*, AUSTIN CHRONICLE, <http://www.austinchronicle.com/calendar/events/event-503667/>.

210 Blumenthal, *supra* note 207.

211 Response by Kenneth E. Foster, Jr. to Human Rights Clinic questionnaire.

212 *Id.* at ¶ 250.

213 *Id.* at ¶ 1.

214 IACHR, Report No. 97/03, Case 11.193, Merits (Publication), Shaka Sankofa, United States, ¶ 1, Dec. 29, 2003.

215 *Id.* at ¶ 15.

216 *Id.* at ¶ 60.

217 *Id.* at ¶ 1.

ACCESS TO PHYSICAL & MENTAL HEALTH CARE

THE ICCPR'S PROTECTION OF A DETAINED PERSON'S "INHERENT DIGNITY"²¹⁸ includes the requirement that all prisoners be treated with humanity.²¹⁹ There is a recognized international standard of a right to medical care, as expressed in the American Declaration of the Rights and Duties of Man, which states, "Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources."²²⁰ According to the Mandela Rules, the provision of health care is a responsibility of the State,²²¹ mandating that "[e]very prison shall have in place a health-care service tasked with evaluating, promoting, protecting and improving the physical and mental health of prisoners, paying particular attention to prisoners with special health-care needs or with health issues that hamper their rehabilitation."²²² State law also exists regulating access to health care.²²³ While some former death row inmates surveyed expressed no qualms about their experience of seeking medical care,²²⁴ testimony from others who have spent time on death row indicate physical and psychological health care may be severely lacking. One inmate characterized the situation succinctly, calling health care on death row a "joke."²²⁵

The Health Services Division of the TDCJ's official statement reads:

It is the mission of the Health Services Division to work with health care contractors and the Correctional Managed Health Care Committee (CMHCC) to ensure health care services are provided to incarcerated offenders in the custody of TDCJ. The Health Services Division has statutory authority (state law) to ensure access to care, monitor quality of care, investigate medical grievances, and conduct operational review audits of health care services at TDCJ facilities.²²⁶

Divisions charged with ensuring access to medical care within the Health Services Division include the Office of Health Services Monitoring, the Office of Professional Standards, the Office of Health Services Liaison, the TDCJ Office of Public Health, and the Office of Mental Health Monitoring and Liaison.²²⁷

218 See also, Convention Against Torture, *supra* note 110, at preamble.

219 International Covenant on Civil and Political Rights, art. 10.

220 American Declaration of the Rights and Duties of Man, art. XI.

221 Mandela Rules, *supra* note 49, at r. 24.

222 *Id.* at r. 25.

223 Health Services Division, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, <http://tdcj.state.tx.us/divisions/hs/index.html>

224 Responses by David Deblanc, Tony Nixon, Kenneth Foster, and Walter Bell Jr. to Human Rights Clinic questionnaire.

225 Response by Anthony Pierce to Human Rights Clinic questionnaire.

226 Health Services Division, *supra* note 223.

227 *Id.*

In a “how-to” guide for requesting medical care in Texas prisons, there are four steps:²²⁸

1. Place a sick call to request medical attention.
2. If your call is not answered within 48 hours, make an I-60 request.
3. If no action has been taken still, file a step 1 and 2 grievance.
4. If still no action is taken, contact the TDCJ Health Services directly.²²⁹

While these steps are useful for an inmate housed in a typical unit, death row inmates who are housed in permanent solitary confinement are not always able to effectively self-advocate, particularly those who suffer from mental health issues. One former inmate stated that he sometimes required outside help to secure needed health care, as channels within the prison were insufficient.²³⁰ Another former resident of death row complained that because it typically took 2-3 days for staff to respond to “sick call” slips, inmates do not receive care for mental health emergencies in a timely manner. If a mental health emergency arises, inmates are “forced to deal with the problem(s) on our own, and 2-3 days later we’ll be able to go tell a psych about what we went through/experienced.”²³¹

DeWayne Brown, the exonerated individual discussed in detail above, shed light on the hurdles death row inmates must navigate in order to access medical attention. Brown explained that in order to get medical attention, inmates fill out “sick cards,” which are—theoretically at least—picked up by the guards and passed on to the medical team.²³² However, because inmates are completely dependent on the guards to communicate medical needs, a hostile officer could obstruct or delay inmates’ access to needed care.²³³ Brown said it was “common” for guards to forget to bring inmates the requested cards, and if a guard “didn’t like” an inmate, or if the inmate had had previous negative incidents with the guard, that inmate would have an impossibly difficult time passing on their request.²³⁴

“[During a lockdown,] I was denied my medication, much of which is for diabetes and heart disease, for eleven straight days. I would ask each nurse or medical technician who came by about my medicine and they would say, ‘Okay, I’ll go check on it,’ then I would not see them again until they made their rounds on a later day. I asked the officers for help, and was told by each that, ‘We don’t have any control over Medical. We can’t force them to help you.’”²³⁵

— Gene Hathorn, former death row inmate

Other formerly detained men have echoed Brown’s doubts on the adequacy of medical access

228 Scott Medlock, *How to Request Medical Care in TDCJ*, TEXAS CIVIL RIGHTS PROJECT, <http://texaslawhelp.org/files/685E99A9-A3EB-6584-CA74-137E0474AE2C/attachments/D820DB72-05AD-3EA5-4A59-14F760EE32B2/428881Request%20TDCJ%20Medical.pdf>

229 *Id.*

230 Response by Mariano J. Rosales to Human Rights Clinic questionnaire.

231 Response by Carl Brooks to Human Rights Clinic questionnaire.

232 Interview with DeWayne Brown, December 2016.

233 *Id.*

234 *Id.*

235 Response by Gene Hathorn to Human Rights Clinic questionnaire.

on death row. As mentioned above, in his 2012 testimony to the Senate Judiciary Committee, Anthony Graves, the 138th person to be exonerated from death row in the United States, called the effectiveness of these divisions into question. Graves described his 18-year ordeal serving time for a crime he did not commit.²³⁶ When describing medical care, Graves testified, “[t]he food lacks the proper nutrition, because it is either dehydrated when served to you or perhaps you’ll find things like rat feces or a small piece of broken glass...There is no real medical care. After I was exonerated and able to go to a doctor, I was told that the food I had been eating caused me to have over 13 percent plaque in my veins, which can cause strokes, heart attacks and aneurysms.”²³⁷

Both Brown and Christian Olsen,²³⁸ a TDCJ inmate who was formerly housed at the Polunsky Unit, cited Government Code Section 65.02, “Inmate Fee for Healthcare” as problematic. Essentially, the statute²³⁹ requires that any inmate housed in a TDCJ facility must pay a fee of \$100 to seek medical assistance.²⁴⁰ While medical care is not denied to indigent inmates, TDCJ does have policy schemes in place to collect the fee.²⁴¹ “If the offender has less than \$5 in their trust fund account, nothing is taken from the balance, but 50% of all future deposits are collected and applied until the total amount is paid. If the offender has \$5 or more in their trust fund account, 50% of the balance or \$100, whichever is less, is collected and applied and, if necessary, 50% of future deposits until the total amount is paid.”²⁴² According to another TDCJ inmate, Whitney Lee Reeves, the fee



Death Row guard stands outside a solitary confinement cell. (DAILY MAIL)

discourages inmates from seeking care as “a concern many inmates discussed was the possibility of being charged for a medical visit when usually the reason for the medical request went untreated, or misdiagnosed.” Reeves states that many inmates decided to “suffer through an issue” rather than risk paying a fee for a medical visit which might or might not offer any relief.²⁴³ Paying to see a doctor, yet receiving no treatment is a very real concern, according to Efrain Perez, who states, “They’re pretty good at scheduling you to see either a physician or a doctor. And they’re also pretty good at finding a reason to say you’re OK. If good medicine is available to you out there, it is not for us in here.”²⁴⁴

²³⁶ Anthony Graves testimony, *supra* note 28.

²³⁷ *Id.*

²³⁸ Response by Christian Olsen to Human Rights Clinic questionnaire.

²³⁹ Texas Government Code § 501.063 §65.02.

²⁴⁰ See also *Texas Department of Criminal Justice Annual Health Care Services Fee*, http://tdcj.state.tx.us/divisions/cmhc/docs/TDCJ_Annual_Health_Care_Services_Fee_Pamphlet.pdf.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Response by Whitney Lee Reeves to Human Rights Clinic questionnaire.

²⁴⁴ Response by Efrain Perez to Human Rights Clinic questionnaire.

Olsen also expressed disappointment with his experience seeking medical care for anxiety and high blood pressure, both of which he developed while on death row.²⁴⁵ According to Olsen, there were no regularly offered physical check-ups unless an inmate was already on a regimen of prescription medication, and it could take several days, or even weeks, to get a medical appointment.²⁴⁶ Similarly, only inmates who were taking psychiatric medication got to meet regularly with psychiatrists. Olsen began seeing a psychiatrist because he “wanted someone to talk to,” but the doctor prescribed anti-anxiety medication which caused him to “sleep a lot.” When Olsen discontinued taking the medication because he could not tolerate its side effects, the psychiatrist stopped seeing him.²⁴⁷

After reading several inmates’ accounts of their experiences with mental health care on death row, a distinct theme begins to emerge. It appears that there is a substantial unmet need for talk therapy, counseling, or some other form of mental health care that is not a one-size-fits-all pharmaceutical solution. While psychiatric medications are helpful for many people with mental illness, the fact that inmates like Olsen are forced to choose between taking unwanted medication and foregoing mental health care entirely is troubling. Several inmates expressed the sentiment that death row psychiatrists are more interested in sedating the prisoners to keep them compliant until execution day than in actually helping their clients.²⁴⁸ Miguel Angel Martinez, a former inmate at the Polunsky Unit, described his experience requesting mental health care as a fruitless task, saying psychological help was “not offered,” and recalled a time where he requested psychiatric attention that he never received.²⁴⁹ Martinez continued, “The only psychological or psychiatric attention that I remember anyone receiving on death row was to be put on psychotropics after someone had already suffered a complete meltdown or had attempted suicide.”²⁵⁰ Whitney Lee Reeves similarly stated that “it appears the primary treatment is to give pills that make you sleep all the time. That doesn’t deal with the problem, you just sleep until you’re executed.”²⁵¹ Reeves also paints a troubling picture of medical personnel conducting psychiatric evaluations and interviews on the cell block, within earshot of other prisoners, writing that the resultant lack of privacy created “barriers to effective psych treatment.”²⁵² According to John Dewberry, when psychiatrists visit inmates they are accompanied by two escort officers, “and the officers will gossip about anything you say, so no one will discuss real problems with them.”²⁵³

The lack of adequate mental health care reported by death row inmates is a serious concern given the documented deleterious effects of solitary confinement on mental health. As discussed above in the section on death row syndrome, prisoners subjected to prolonged solitary confinement overwhelmingly tend to suffer psychological trauma. Inmates who entered prison with no pre-

245 Response by Christian Olsen to Human Rights Clinic questionnaire.

246 *Id.*

247 *Id.*

248 Responses by Christian Olsen, Miguel Angel Martinez, Whitney Lee Reeves, Nanon Williams, Anthony Pierce, John Herrin, Gene Hathorn and Kenneth Foster, Jr to Human Rights Clinic questionnaire.

249 Response by Miguel Angel Martinez to Human Rights Clinic questionnaire.

250 *Id.*

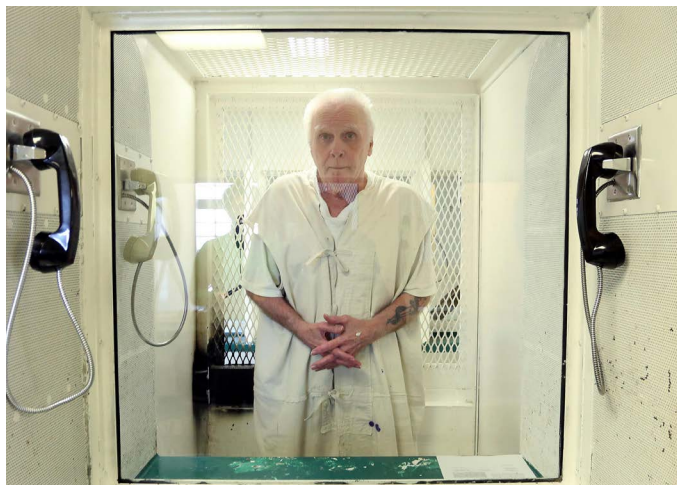
251 Whitney Lee Reeves survey.

252 *Id.*

253 John Dewberry survey.

existing mental health disorders tend to develop new conditions, while inmates with pre-existing mental illness have their conditions exacerbated by the experience of solitary confinement. One striking example is that of Victor Saldaño, an Argentinian national who developed a mental illness while on death row in the Polunksky Unit and whose case reached the Inter-American Commission of Human Rights.²⁵⁴ Saldaño was convicted in 1996 for kidnapping a Texan citizen, and suffered a dramatic decline in mental health while on death row. “During the sentencing trial in 2004, Saldaño masturbated twice in the presence of jurors, and prosecutors cited incidents inside the prison, like smearing feces and urine on cell walls.”²⁵⁵

The lack of mental health care is even more concerning in light of the fact that some individuals sentenced to death in Texas would be considered disqualified for capital punishment due to intellectual disability in most of the U.S. Texas’ standards for evaluating intellectual disability recently came



Carl Buntion, 72, is the oldest inmate on Texas’ death row.
(JORGE SANHUEZ-LYON/TEXAS STANDARD)

under scrutiny and received a strong condemnation by the Supreme Court. In *Moore v. Texas*, it held that the Texas Court of Criminal Appeals “failed adequately to inform itself of the medical community’s diagnostic framework,” and that the Texas’ standard creates “an unacceptable risk that persons with intellectual disability will be executed” (internal quotations omitted).²⁵⁶

Long periods of solitary confinement have particularly detrimental effects on geriatric inmates. According to TDCJ any inmate older than 55 is considered geriatric. As such, the aging death row population is subject to an aggravating factor for health problems, meaning that some inmates die of natural causes rather than by being executed. In other words, “for those who live just long enough, there’s more than one way to die on death row”.²⁵⁷

i. INTERNATIONAL CRITICISM OF TEXAS’ TREATMENT OF INMATES

IN BRIEFINGS FOR an IAHCR case for Texas death row inmate Felix Rocha Diaz, “[p]etitioners state[d] that medical care and nutrition are a major concern for inmates given that breakfast is served at 3.00am, so inmates must choose between sleeping through the night or skipping the meal, and many feel hungry after lunch, having to buy additional food at a store in the prison

²⁵⁴ IACHR, Report No. 38/99, Petition, Victor Saldaño, Argentina, March 11, 1999.

²⁵⁵ U.S. News, Mother of Argentine on death row in Texas met with Pope Francis, hopes he’ll advocate for son, August 27th, 2015. <https://www.usnews.com/news/world/articles/2015/08/27/argentine-mom-hopes-pope-will-help-get-son-off-death-row>.

²⁵⁶ *Moore v. Texas*, No. 15-797, slip op. at 14,18 (Mar. 28, 2017).

²⁵⁷ Joy Diaz, *For Elderly Inmates, There’s More Than One Way to Die on Death Row*, KUT 90.5 (Jan. 24, 2017), <http://kut.org/post/elderly-inmates-theres-more-one-way-die-death-row>.

facility. They also indicate that necessities like soap, shampoo, and deodorant are not provided by the prison and must also be purchased at the prison store.”²⁵⁸ Here, although it did not make a ruling specifically addressing inadequate health care, the Commission found Texas in violation of “the right to life, liberty and personal security (Article I), right to a fair trial (Article XVIII), right of protection from arbitrary arrest (Article XXV) and right to due process of law (Article XXVI) guaranteed in the American Declaration...Consequently, should the State carry out the execution of Mr. Rocha, it would be committing a serious and irreparable violation of the basic right to life enshrined in Article I of the American Declaration.”²⁵⁹

In another IAHCR case, lack of access to medical care was cited as an example of substandard conditions. The decision reads,

Mr. Ramírez Cardenas suffers from Nephrotic Syndrome, a type of disease which causes the kidneys gradually to lose their ability to filter wastes and excess water from the blood. The petitioners indicate that he has been in and out of John Sealy Hospital in Galveston, Texas several times due to this disease, which appeared during his stay on death row. Although hospital policy provides that a patient cannot be removed from the hospital if his attending doctor has not previously discharged him, Mr. Ramírez Cardenas has been returned to death row without being discharged by his doctors on more than one occasion.²⁶⁰

While little official information is available about access to psychological care, testimony from former inmates indicates that many prisoners are suffering in solitary confinement without proper access to mental health care.²⁶¹ In the above referenced testimony to the Senate Judiciary Committee, Anthony Graves noted, “I know a guy who would sit in the middle of the floor, rip his sheet up, wrap it around himself and light it on fire. Another guy would go out in the recreation yard, get naked, lie down and urinate all over himself. He would take his feces and smear it all over his face as though he was in military combat.”²⁶²

258 IACHR, Report No. 11/15, Case 12.833, Felix Rocha Diaz, United States, ¶ 42, March 23, 2015.

259 *Id.* at ¶ 110.

260 IACHR, Report No. 90/09, Case 12.644, Ramirez Cadenas, United States, ¶ 61, 2009.

261 Responses by John Dewberry, Christian Olsen, Miguel Angel Martinez, Whitney Lee Reeves, Nanon Williams, Anthony Pierce, John Herrin, Gene Hathorn, David DeBlanc, Carl Brooks and Jose Briseno to Human Rights Clinic questionnaire.

262 Anthony Graves testimony, *supra* note 28.

CONCLUSION

CAPITAL PUNISHMENT IS IN DECLINE NATIONWIDE.²⁶³ THE RATE AT WHICH CAPITAL sentences are imposed has steadily decreased in recent years, with the U.S. and Texas moving away from the practice as a whole. Yet, a small number of states continue to account for a significant number of death sentences, and the state of Texas stands out among these states as the lethal “capital of capital punishment.”²⁶⁴

As Texas continues to sentence offenders to death, the living conditions on death row are in urgent need of reform. After examining the physical conditions on Texas’s death row and TDCJ’s current policies, this report has found that Texas’ capital punishment system stands in violation of basic human rights, as well as a number of international treaties that were voluntarily ratified by the U.S. and which are binding on Texas.

The 1999 reintroduction of mandatory solitary confinement for death row inmates has resulted in a form of extended death row punishment.²⁶⁵ The practice has provoked significant criticism from the international community, with many human rights bodies specifically condemning Texas’ utilization of long-term solitary confinement as a serious human rights violation.²⁶⁶ The practice has been held to constitute cruel, inhuman or degrading treatment and, thus, an act of torture as defined and prohibited by the Convention Against Torture²⁶⁷ and prohibited by the American Declaration on the Rights and Duties of man²⁶⁸, and the ICCPR.²⁶⁹ The dehumanizing nature and severely detrimental physical and psychological effects of such long-term isolation, namely “death row syndrome”, should not be underestimated. This report has explored the ways in which prolonged solitary confinement exacerbates pre-existing mental health disorders, as well as its association with the development of mental health issues in otherwise unaffected individuals. The complete lack of human contact, often for a number of decades, in conjunction with limited access to recreational activity or materials and any form of outside stimuli, is severely detrimental to Texas death row inmates’ mental health.²⁷⁰

Both the practice of prolonged isolation and the physical conditions present on death row have been condemned by the Inter-American Commission on Human Rights, and recommendations have been put forth by the Commission, as well as several UN Committees and Special Rapporteurs concerned with the prohibition of torture. The IACHR has repeatedly found the conditions of Texas’ death row to be abuses in violation of the American Declaration on the Rights and Duties of Men, and has specifically opined that the use of solitary confinement should be reserved for

263 *Too Broken to Fix*, *supra* note 13.

264 Dieter, *supra* note 8.

265 *Reassessing Solitary Confinement II*, *supra* note 27.

266 United Nations, Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant*, CCPR/C/USA/CO/3/Rev.1 ¶ 32 (Dec. 18, 2006), available at undocs.org/CCPR/C/USA/CO/3/Rev.1.

267 Convention Against Torture, art. 1.

268 American Declaration on the Rights and Duties of Man, art. XXV, XXVI.

269 International Covenant on Civil and Political Rights, art. 7.

270 *Solitary Failure*, *supra* note 50.

exceptional circumstances and implemented only as a last resort.²⁷¹ The Commission has found that the common issue of repeated calls to execution is a further violation of the American Declaration, and has referenced the “psychological damage” which such a practice can have on an inmate.²⁷² Similarly, the lack of access to medical and psychological care, as well as the routine barriers in place regarding inmates’ right to religious services²⁷³, are evidence of substandard conditions which Texas death row inmates are forced to live with, and are in clear violation of a number of international human rights instruments to which Texas is legally bound.²⁷⁴ The current conditions constitute an act of continuous torture against the inmates in question,²⁷⁵ and are inconsistent with international standards to which Texas must adhere.²⁷⁶ In order to establish a human right constituency within the state, and to contribute to the development of international human rights norms and a universal culture of compliance, the U.S.—and Texas specifically—should implement the relevant recommendations put forth by the governing international bodies. This will allow for abolition of the practice of mandatory solitary isolation for death row inmates, and will ensure the full realization of rights afforded to inmates by several international instruments. The right to be free from torture is an absolute human right, and it is submitted that the current conditions of confinement on Texas’ death row, including mandatory indefinite isolation, amounts to a severe and relentless act of torture which cannot be permitted in the international community.

271 IACHR, *Report on the human rights of persons deprived of liberty in the Americas*, OEA/Ser.L/V/II, doc. 64 ¶ 319, 407-418 (December 31, 2011).

272 IACHR, Report No. 97/03, Case 11.193, Merits (Publication), Shaka Sankofa, United States, ¶ 60, Dec. 29, 2003.

273 Universal Declaration of Human Rights, art. 18.

274 Namely, the Universal Declaration of Human Rights, the American Declaration on the Rights and Duties of Man, and the International Covenant on Civil and Political Rights.

275 United Nations, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/66/268 ¶ 76, 87-88, (Aug. 5, 2011), available at undocs.org/A/66/268. See also United Nations, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/68/295 ¶ 60-61 (Aug. 9, 2013) available at undocs.org/A/68/295.

276 United Nations, Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 ¶ 20 (April 23, 2014).

RECOMMENDATIONS

THE RIGHT TO BE FREE FROM TORTURE IS AN ABSOLUTE HUMAN RIGHT, AND IT IS submitted that the current conditions of confinement on Texas' death row, including mandatory indefinite isolation, amounts to a severe and relentless act of torture. The Clinic recommends that TDCJ and the Texas Legislature heed the numerous advisements of international bodies, and adopt the appropriate measures to remedy the faults found in this report. This should be done with the implementation of the following:

SOLITARY CONFINEMENT

1. Texas should impose strict limits on the use of solitary confinement and bring the conditions of death row detention facilities into line with international standards.²⁷⁷
2. Solitary confinement should only be imposed as a measure of last resort, and for as short a time as possible.
3. This includes abolishing the mandatory use of solitary confinement for death row inmates and reinstating living conditions more similar to an average TDCJ unit.
4. Because of its adverse psychological effects, Texas should entirely ban the use of solitary confinement for inmates with mental illness or intellectual disability.
5. Reinstatement of contact visits for death row inmates, both with family and friends and with attorneys.
6. Ensure inmates have access to natural light, fresh air and outdoor activities.

REPEATED CALLS UP TO EXECUTION

1. Review the current Texas statute to ensure that any and all possible legal remedies are completely exhausted before an execution date can be set by TDCJ.
2. Access to Health Care:
3. Make it easier for inmates to request medical care by improving communication channels between inmates and health care providers.
4. Ensure that routine check-ups, both physical and psychological, are conducted at appropriately frequent intervals.
5. Provide counseling and mental health care for inmates both prior to execution and after a last-minute stay has been granted.

²⁷⁷ United Nations, Human Rights Committee, *Concluding observations on the fourth periodic report of the United States of America*, CCPR/C/USA/CO/4 (April 23, 2014).

ACCESS TO RELIGIOUS SERVICES

1. Reinstate communal religious services for inmates at Polunsky Unit.
2. Provide easy access for religious volunteers, including ensuring that sufficient guard escorts are available for visitors.



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